

O/1016/25

TRADE MARKS ACT 1994

IN THE MATTER OF UK TRADE MARK APPLICATION NUMBER 4056491

BY POLLO HUB FRANCHISING LTD
TO REGISTER THE FOLLOWING TRADE MARK:



IN CLASS 29, 30, 35 AND 43

AND

IN THE OPPOSITION THERETO

UNDER NUMBER 449613

BY LORD OF THE WINGS LIMITED

BACKGROUND & PLEADINGS

1. On 27 May 2024, Pollo Hub Franchising Ltd (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK (“the contested mark”). The contested mark was published for opposition purposes in the Trade Marks Journal on 14 June 2024 in respect of the following goods:

Class 29: Chicken; Chicken pieces; Chicken nuggets, strips, poppers, wings, fillets; Chicken mince and shaped and spiced chicken mince being burgers, meatballs, koftas, kebabs, nuggets; Cooked, roasted, barbecued, grilled, fried, deep-fried chicken; Prepared meals containing principally chicken; Burgers, meatballs, meat patties, shaped and spiced mince being burgers, meatballs, koftas, kebabs, nuggets; Vegetable, mushroom, bean or tofu burgers, patties, and balls; Prepared meals containing principally chicken.

Class 30: Sauces (condiments); Spices; Coating for chicken, batter coatings for chicken pieces; Chicken spices.

Class 35: Retail, wholesale and online retail and wholesale services connected with the sale of chicken, meat, fish, seafood, poultry and their extracts, prepared or packaged meals consisting substantially of chicken, chicken pieces, chicken nuggets, chicken strips, chicken poppers, chicken wings, chicken fillets, chicken mince and shaped and spiced chicken mince, meat, fish, seafood, and poultry; Retail, wholesale and online retail and wholesale services connected with the sale of prepared meals containing principally chicken, burgers, meatballs, meat patties, shaped mincemeat, patties and balls, formations of vegetables, mushrooms, beans and tofu, foodstuffs comprising or made from any of the aforesaid goods.

Class 43: Services for providing food and drink; Restaurant, cafe and catering services; Preparation of food and drink; Restaurant services for the provision of fast food; Take away services; Provision of information, advisory and consultancy services in relation to the aforementioned services.

2. On 13 September 2024, the contested mark was opposed by Lord of the Wings Limited (“the opponent”). The opposition is brought under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).
3. For the purposes of its opposition, the opponent relies upon the following word mark (“the earlier mark”):

Lucky’s Hot Chicken

Trade mark number: UK00003882795

Filing Date: 27 February 2023

Registration Date: 28 July 2023

4. The opponent relies upon all of the goods and services for which its earlier mark is registered, namely:

Class 29: Chicken; Fried chicken; Chicken burgers; Chicken wings; Chicken nuggets.

Class 30: Chicken sandwiches; Sauces for chicken; Sandwiches containing chicken.

Class 43: Catering (Food and drink -); Food and drink catering; Fast food restaurants; Take-away food and drink services; Take-away fast food services; Fast-food restaurant services; Restaurant and bar services; Take-away restaurant services; Restaurant services.

5. 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 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.

6. The mark identified in paragraph 3 qualifies as an earlier trade mark under the above provisions. As the earlier mark had not completed its registration process more than five years before the relevant date, it is not subject to proof of use requirements. Consequently, the opponent may rely on all of the goods and services highlighted in paragraph 4 of this decision for the purposes of this opposition.
7. The opponent submits that the applicant's use and registration of the contested mark, in connection with the goods and services in its specification, "creates a risk that the relevant public might believe that the goods and services in question come from the same or economically linked undertakings as the goods and services covered by the Opponent's [earlier mark]."
8. The applicant filed a counterstatement denying the claims made against it. Specifically, the applicant submits that the differences between the marks in issue are "significant, not minor, and are clearly enough to counteract and outweigh any similarity between the marks". The applicant therefore submits that the opposition should be "rejected in its entirety" and requests that an award of costs should be made in its favour.
9. The opponent is represented by Ashfords LLP. The applicant is represented by Harper Macleod LLP. In this case, neither party filed evidence. No hearing was requested, and only the opponent filed written submissions in lieu of a hearing. This decision is therefore taken following a careful consideration of the papers that have been filed by the parties, which will not be summarised but will be referred to as and where appropriate during this decision.
10. 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.

PRELIMINARY ISSUES

11. I note the applicant's submissions that it has been using the contested mark since September 2022, that it has created "substantial goodwill" in the contested mark from the operation of its business, that the distinctiveness of the contested mark has been heightened through use and that it "is not aware of any confusion which has arisen between" the contested mark and the earlier mark. Whilst these submissions have been noted, they will not impact my overall decision in this instance for the reasons outlined below.

12. As a preliminary point, it should be noted that there is no requirement for the applicant to evidence proof of use of the contested mark, or for me to consider the extent of the applicant's use of the contested mark for the purposes of this opposition given that it is being pursued under section 5(2)(b) of the Act only. The level of distinctive character, and particularly any enhanced distinctive character through use, will only be relevant for the purposes of this opposition in respect of the earlier mark, as is discussed in further detail in paragraphs 68 to 76 below.

13. Further, whilst evidence of a lack of confusion by consumers over an extended period of time may point towards there being no likelihood of confusion,¹ I do not consider that I have sufficient evidence before me to make such a determination in this instance. I do not consider the information provided by the applicant (i.e. the submission that it has been using the contested mark since 2022, the various links to its social media pages, and confirmation of its number of followers on these social media pages) to be sufficient to evidence use of the contested mark from September 2022. I also have not been provided with any evidence of the opponent's use of the earlier mark, nor is the opponent required to provide such evidence for the reason outlined in paragraph 6 above. However, without such evidence, I am prohibited from being able to determine why there has been no

¹ Paragraphs 34 and 35 of the decision of Dr Brian Whitehead in Azumi Limited v Nick Robinson, Case No. O/078/22

evidence of confusion between the marks and whether that is because there is no likelihood of confusion between the marks or whether another factor has resulted in there being no actual confusion (for example, because the parties offer quite distinct goods and services, despite the respective marks being registered/protected in relation to the same wider category of goods and services).

DECISION

Section 5(2)(b)

14. This opposition is based upon section 5(2)(b) of the Act which stipulates the following:

“5(2) A trade mark shall not be registered if because-

(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 stipulates that 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. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*,² *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (“Canon”),³ *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.*,⁴ *Marca Mode CV v Adidas AG & Adidas Benelux BV*,⁵ *Matratzen Concord GmbH v Office*

² Case C-251/95

³ Case C-39/97

⁴ Case C-342/97

⁵ Case C425/98

for Harmonization in the Internal Market (Trade Marks and Designs) (“OHIM”),⁶ Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,⁷ Shaker di L. Laudato & C. Sas v OHIM⁸ and Bimbo SA v OHIM⁹:

- 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 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

⁶ Case C-3/03

⁷ Case C-120/04

⁸ Case C-334/05P

⁹ Case C-591/12P

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

Comparison of Goods and Services

17. The competing goods and services are as follows:

The opponent’s goods and services	The applicant’s goods and services
<p><u>Class 29:</u> Chicken; Fried chicken; Chicken burgers; Chicken wings; Chicken nuggets.</p>	<p><u>Class 29:</u> Chicken; Chicken pieces; Chicken nuggets, strips, poppers, wings, fillets; Chicken mince and shaped and spiced chicken mince being burgers, meatballs, koftas, kebabs, nuggets; Cooked, roasted, barbecued, grilled,</p>

	<p>fried, deep-fried chicken; Prepared meals containing principally chicken; Burgers, meatballs, meat patties, shaped and spiced mince being burgers, meatballs, koftas, kebabs, nuggets; Vegetable, mushroom, bean or tofu burgers, patties, and balls; Prepared meals containing principally chicken.</p>
<p><u>Class 30:</u> Chicken sandwiches; Sauces for chicken; Sandwiches containing chicken.</p>	<p><u>Class 30:</u> Sauces (condiments); Spices; Coating for chicken, batter coatings for chicken pieces; Chicken spices.</p>
	<p><u>Class 35:</u> Retail, wholesale and online retail and wholesale services connected with the sale of chicken, meat, fish, seafood, poultry and their extracts, prepared or packaged meals consisting substantially of chicken, chicken pieces, chicken nuggets, chicken strips, chicken poppers, chicken wings, chicken fillets, chicken mince and shaped and spiced chicken mince, meat, fish, seafood, and poultry; Retail, wholesale and online retail and wholesale services connected with the sale of prepared meals containing principally chicken, burgers, meatballs, meat patties, shaped mincemeat, patties and balls, formations of vegetables, mushrooms, beans and</p>

	tofu, foodstuffs comprising or made from any of the aforesaid goods.
<u>Class 43:</u> Catering (Food and drink -); Food and drink catering; Fast food restaurants; Take-away food and drink services; Take-away fast food services; Fast-food restaurant services; Restaurant and bar services; Take-away restaurant services; Restaurant services.	<u>Class 43:</u> Services for providing food and drink; Restaurant, cafe and catering services; Preparation of food and drink; Restaurant services for the provision of fast food; Take away services; Provision of information, advisory and consultancy services in relation to the aforementioned services.

18. The opponent submits that many of the opponent's class 29, 30 and 43 goods and services are identical to the applicant's class 29, 30, 35 and 42 goods and services, on the basis that they either appear in both parties' specification, or they are included in a more general category. In respect of the applicant's remaining goods and services, the opponent submits that these are highly similar to the opponent's goods and services.

19. It is noted that the applicant accepts that the goods and services in issue are either identical or similar, but the applicant fails to identify which of the goods and services it considers to be similar or identical, or the extent to which such similarity is agreed. Whilst I appreciate that, in the light of this admission, I must accept that there is at least some similarity between the goods and services in issue. However, for the purpose of properly considering any likelihood of confusion, it still remains appropriate for me to complete a full assessment of the level of similarity between the goods and services.

20. As a preliminary point, it should be noted that section 60A of the Act provides that goods and services are not to be regarded as being similar to each other on

the ground that they appear in the same class under the Nice Classification¹⁰, or dissimilar on the ground that they appear in different classes under the Nice Classification.”

21. In *Canon*, the Court of Justice of the European Union (“CJEU”) stated (at paragraph 23) that, when making the comparison, “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”.
22. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case¹¹, for assessing similarity were:
 - a. The uses of the respective goods or services;
 - b. The users of the respective goods or services;
 - c. The physical nature of the goods or services;
 - 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

¹⁰ “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.

¹¹ [1996] R.P.C. 281

whether market research companies, who of course act for industry, put the goods in the same or different sectors.

23. In *Gérard Meric v OHIM*, the General Court confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa)¹²:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

24. As per the case of *Separode*,¹³ I also bear in mind that it is permissible to group the goods/services together, for the purpose of comparison, where they are sufficiently comparable to be assessable in essentially the same way for the same reasons.

Chicken; Chicken nuggets

25. It is noted that the terms “Chicken” and “chicken nuggets” appear in both the applicant and opponent’s specifications and that these goods are, therefore, self-evidently identical.

Chicken pieces; Chicken ... strips, poppers, wings, fillets; Chicken mince and shaped and spiced chicken mince being burgers, meatballs, koftas, kebabs, nuggets; Cooked, roasted, barbecued, grilled, fried, deep-fried chicken; Prepared meals containing principally chicken;

¹² Case T-133/05

¹³ BL O/399/10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person

26. All of the above referenced goods are types of “chicken”. I therefore find that these goods would all fall within the wider term “Chicken” in the opponent’s specification, and that they are identical in line with the principle established in *Meric*.

Burgers... meat patties, shaped and spiced mince being burgers...;

27. I consider that the average consumer would identify “patties” as a flattened, usually round serving of ground meat/meat alternative. Whilst the term burger may be used to refer to the prepared burger (i.e., a meat patty placed within a “burger” bun), I am also conscious that this term is often used in the United Kingdom to refer to just the burger meat itself, and I note that a pack of burger meat will generally be advertised as a pack of “burgers” at a general supermarket. I am therefore of the view that the average consumer in the United Kingdom would identify pattie as an alternative phrase for a burger. With that said, I note that the opponent’s specification includes chicken burgers, and that this would fall within the wider terms of burgers or meat patties in the applicant’s specification. Consequently, I consider these goods to be identical in line with the principle established in *Meric*.

... meatballs, ...shaped and spiced mince being ...meatballs, koftas, kebabs, nuggets;

28. As a preliminary point, I note that the above goods are all different ways of presenting meat, but all of these goods can be produced by utilising various types of meats (for example, you can purchase chicken mince/chicken kebabs or lamb mince/lamb kebabs).

29. I note that the opponent’s specification includes chicken burgers. Whilst I appreciate that the nature of the goods underlined above differ to that of chicken burgers in the way the meat is presented (for example, a burger is presented as a flattened, round serving of meat, whereas a meatball is presented in a spherical shape), these goods overlap in users (the general public), method of use and purpose (to be eaten). I also consider there to be an overlap in trade channels between these goods, and that there will be a level of competition on the basis

that, for example, the average consumer may purchase a chicken burger instead of a chicken kebab, or vice versa. Consequently, I consider these goods to be highly similar.

Vegetable, mushroom, bean or tofu burgers, patties...:

30. I note that all of these goods are different types of vegetarian substitutes for meat burgers/patties. The opponent's specification includes "chicken burgers" and I consider there to be an overlap in the use (i.e., to eat) and users of these goods and the above referenced goods (i.e., the general public). I also consider there to be some overlap in physical nature between the above referenced goods and the opponent's "chicken burgers" in that the vegetarian alternative are designed to replicate the shape and construction of meat burgers/patties, albeit I appreciate that they comprise different ingredient. I also consider that there is an overlap in trade channels given that these products are either bought uncooked in the fridge/freezer sections of food stores/supermarkets, albeit the vegetarian options are usually located in a separate "vegan/vegetarian" section on the fridge/freezer aisles, or these goods can all be purchased cooked from restaurant/take-away establishments.
31. I do also consider that there is a level of competition between the above referenced goods and the opponent's "chicken burgers" in that consumers may choose to purchase one in the place of the other. However, I do not consider there to be any complementarity between the above referenced goods and the opponent's specification. This is because whilst the average consumer may believe that these goods derive from the same undertaking, I do not consider them to be important or indispensable from one another.
32. Considering all of the above, I do consider the above referenced goods to be highly similar to the opponent's "chicken burgers".

Vegetable, mushroom, bean or tofu ... balls:

33. I note that all of the above goods are various types of vegetarian substitutes for meat balls. I note that the opponent's specification does not contain meat alternatives, it contains various types of presentations of chicken, including chicken generally, chicken burgers and chicken kebabs.
34. These goods all clearly differ in nature in that their ingredients differ, as does their presented shape. However, I note that there is an overlap in user (the general public), use (to be eaten) and trade channels (food retailers/food establishments). I also consider there to be a level of competition because both parties' goods typically form the 'protein' part of a balanced meal and, in that sense, the average consumer may decide to purchase "vegetable, mushroom, bean or tofu... balls" over a chicken alternative. Consequently, I consider the above underlined goods to be similar to the opponent's chicken goods to a medium degree.

Sauces (condiments):

35. I note that the opponent's specification includes "Sauces for chicken", and I consider "Sauces (condiments)" generally to be a wider term within which sauces specifically for chicken would fall. Consequently, I find these goods to be identical in line with the principle established in *Meric*.
36. However, to the extent that the applicant's term would cover goods that are not identical, I consider these goods to be highly similar. This is because they overlap in user (i.e., the general public), use and purpose (i.e., to be eaten and to provide complementary flavour to foods). These goods are also similar in nature (being sauces), and share trade channels on the basis that they will be purchased from food retailers or food establishments. There is clearly also competition between the goods in that you may choose to purchase one in the place of the other to provide additional flavour to your foods.

Spices; Chicken spices.

37. I compare the applicant's above referenced goods with the opponent's "chicken sauce". Whilst I note that there is a difference in nature between these goods, in that they may contain different ingredients and will be different in consistency, I note that there is an overlap in user (the general public) and use (to provide additional flavour to food, specifically chicken). I also consider there to be a level of competition between the opponent's chicken sauce and the applicant's spices, in that the user may choose one of these goods over the other to provide additional flavour to chicken. Overall, I consider the applicant's spices to be similar to a medium degree to the opponent's chicken sauce.

Coating for chicken, batter coatings for chicken pieces;

38. I compare the applicant's above referenced goods with the opponent's "chicken sauce". Once again, the nature of these goods differs, in that they may contain different ingredients and will be different in consistency. There is some overlap in use between these goods in that they will all be added to other food goods. However, there is a difference in purpose in that that chicken coating is intended to alter the texture of the chicken, whereas the chicken sauce is intended to add flavour to the chicken. Having said that, there is an overlap in user (the general public) and trade channels (food retailers). Overall, I consider the applicant's coating/batter coating to be similar to a low degree to the opponent's chicken sauce.

Retail, wholesale and online retail and wholesale services connected with the sale of chicken, meat... poultry and their extracts, prepared or packaged meals consisting substantially of chicken, chicken pieces, chicken nuggets, chicken strips, chicken poppers, chicken wings, chicken fillets, chicken mince and shaped and spiced chicken mince, meat...and poultry; Retail, wholesale and online retail and wholesale services connected with the sale of prepared meals containing principally chicken, burgers, meatballs, meat patties, shaped mincemeat, patties and balls

39. I compare the applicant's above referenced services with the opponent's chicken goods. This is a comparison of goods against services, and by virtue of that fact, they will differ in nature and method of use/purpose (for example, the purpose of the goods is to be eaten, and the purpose of the services is to sell those goods albeit the ultimate end purpose will be the same). However, I do consider there to be an overlap in user (that being members of the general public). There is, inevitably, an overlap in trade channels, and the goods and services are also complementary as the average consumer are likely to believe that they derive from the same undertaking, and they are important/indispensable from one another. Consequently, I do consider these goods and services to be similar to a medium degree.

Retail, wholesale and online retail and wholesale services connected with the sale of ... fish, seafood... and their extracts, prepared or packaged meals consisting substantially of... fish, seafood...; Retail, wholesale and online retail and wholesale services connected with the sale of prepared meals containing... formations of vegetables, mushrooms, beans and tofu, foodstuffs comprising or made from any of the aforesaid goods.

40. I compare the applicant's above referenced services with the opponent's class 43 services. These services do, of course, differ in that the opponent's class 43 services will relate to the provision of ready to eat meals, whereas the applicant's class 35 services relate to the provision of either food goods that will require preparation and cooking, or "ready meals" that have been prepared but are likely to still require cooking to some degree. Having said that, I do consider there to be an overlap in user (that being members of the general public or professional consumers seeking wholesale goods or catering services). There is also an overlap in purpose, as both are services intended to facilitate the consumption of food (albeit in different ways). I also consider there to be a level of competition between these services in that users may seek to utilise the retail services to purchase the food goods to make a meal at home, or to utilise the restaurant/takeaway services to either eat out or have the prepared meals delivered to eat at home. Consequently, I do consider these services to be similar to a low to medium degree.

Services for providing food and drink; Restaurant, cafe and catering services; Preparation of food and drink; Restaurant services for the provision of fast food; Take away services;

41. I find that these terms are identical to the opponent's terms "Fast food restaurants", "Take-away food and drink services", "Take-away fast foods services", "Fast-food restaurant services" and "Take-away restaurant services" either self-evidently or on the principle outlined in *Meric*.

Provision of information, advisory and consultancy services in relation to the aforementioned services.

42. The above referenced services relate to the "provision of information, advisory and consultancy services" for food and drink, restaurant, café, catering and take-away services. I consider these services to be at least similar to a low degree to the opponent's restaurant, bar and catering services since there is complementarity between them, given the existence of the restaurant, bar and catering services is a necessary condition for the need of the applicant's advisory and consultancy services.

Average consumer and the purchasing act

43. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. 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 and services in question (see *Lloyd Schuhfabrik Meyer*¹⁴).

¹⁴ Case C-342/97

44. 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*,¹⁵ Birss J. held:

“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.”

45. For all of the goods and services in issue, the average consumer is a member of the general public. I note that the applicant’s class 43 “provision of information, advisory and consultancy services” could cover a broad range of services, including the provision of information regarding restaurants to members of the general public (for example, running a website that collates reviews on food and drink establishments for members of the public), as well as the provision of specific advisory and consultancy services to food and drinks establishments. Consequently, I consider there to be two types of consumers for this service, the general public identified above and the professional consumers (i.e., the food and drink establishments themselves).
46. The goods in issue are likely to be purchased on a frequent basis, and at a relatively low price, whereas the frequency of use and price of the services in issue is likely to vary quite considerably. When purchasing the goods the average consumer is likely to consider factors such as the quality/origin of the goods (specifically the meat goods), the flavour of the goods and the nutritional content of the prepared meals. In relation to the services, there will be times where the average consumer needs to find something to eat or drink very quickly. On other occasions, they will make a more considered choice, taking account of the range of options on the menu, the ingredients used, the cleanliness of the

¹⁵ [2014] EWHC 439 (Ch)

establishment offering the services, reviews, and whether the service caters for any dietary requirements that the average consumer has.

47. On balance, I find that a medium level of attention will be paid by the average consumer when purchasing the goods in issue, and a medium level of attention will be paid by the general public when utilising the services in issue. However, I appreciate that the level of attention paid by a professional user is likely to be slightly higher.
48. In respect of both types of consumers, the goods and services may be purchased following perusal of signage online via the undertaking's website or social media accounts. Alternatively, the goods and services may be selected after viewing information on signage at the undertaking's premises or in promotional materials. However, I do not discount that word-of-mouth recommendations may play a part, and advice may be sought from retail assistants. Consequently, I find that the purchasing process for the goods and services will be primarily visual in nature, though I do not discount an aural component playing a role.

Comparison of marks

49. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a 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 marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*,¹⁶ 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

¹⁶ Case C-591/12P

impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

50. 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.

51. The respective trade marks are shown below:

Earlier mark	Contested mark
Lucky's Hot Chicken	 The logo for 'Lucky B's Hot Chicken' features a stylized red and yellow chicken head on the left. To its right, the words 'Lucky B's' are written in a large, bold, yellow script font with a black outline. Below this, the words 'HOT CHICKEN' are written in a smaller, white, sans-serif font with a black outline. The entire logo is set against a red rectangular background.

52. The opponent has submitted that the overall impression of the marks in issue is very similar, and that they are visually and conceptually similar to a medium to high degree, and aurally similar to a high degree. By contrast, the applicant submits that the marks are textually, visually, aurally and phonetically distinct.

Overall Impression

53. The earlier mark is a word only mark. There are no other elements in the mark which contribute to its overall impression, so the overall impression lies in the words themselves. I consider the words “hot chicken” to be descriptive of the opponent’s goods and services. The word hot is descriptive of the strength or flavour of the goods being sold (or the services that relate to those goods), and “chicken” is either self-evidently descriptive of the opponent’s goods or indicates

that the services are likely to include chicken products. I am also conscious that the General Court noted in *El Corte Inglés, SA v OHIM*,¹⁷ that the beginnings of words tend to have more visual and aural impact. Consequently, I consider that the words “Hot Chicken” play a lesser role in the overall impression of the mark, with the word “Lucky’s” being the dominant element.

54. The contested mark is a figurative mark which consists of the words “Lucky B’s Hot Chicken”. The words “Lucky B’s” are presented in a black stylised font, and are initially surrounded by a yellow border and then layered on a red background. The yellow border is also stylised so that it appears to be dripping underneath the words “Lucky B’s”.
55. There is also a chicken head device to the left of the word Hot Chicken which, for the same reasons outlined in paragraph 53 above, is descriptive or non-distinctive of the applicant’s goods and services.
56. The words “Hot Chicken” are presented under the words “Lucky B’s”, and in a significantly smaller and less stylised upper case white font. Some of the yellow dripping stylisation surrounding the word “Lucky B’s” also appears to drip over some of the letters in the words “Hot Chicken”. I consider that the stylisation, the chicken head device and the words HOT CHICKEN play a lesser role in the overall impression than the other elements of the mark because the eye is naturally drawn to the word elements, and because of the descriptive/non-distinctive nature of the words HOT CHICKEN and the chicken head device. As a consequence, I find that “Lucky B’s” plays the greater role in the overall impression of the contested mark.

Visual Comparison

57. Visually, the marks share the same first five letters (“Lucky”), last two words “Hot Chicken”, and an “s” prior to the words “Hot Chicken”. However, the “s” in the contested mark is intercepted by a letter B, which is absent from the earlier mark.

¹⁷ Cases T-183/02 and T-184/02

The contested mark also contains a chicken head device at the beginning of the mark and additional stylisation. As none of these elements are present in the earlier mark, they represent points of visual difference between the marks.

58. The applicant submits that “B’s” in the contested mark is not simply the addition of a single letter, but a second word forming part of mark, and whilst not expressly stipulated, the applicant appears to be asserting that an additional word in a mark is more significant than an additional letter. The applicant relies on the example of the word “Plan”, as compared to the word “Plan B”. However, I do not consider that it matters whether the “B” would be identified as a word or letter by the average consumer, what matters is that, in either instance, this additional element acts as a point of visual difference.
59. With that said, whilst I appreciate the points of visual difference between the marks, I also note my finding that the word “Lucky’s” in the earlier mark and the words “Lucky B’s” in the contested mark are the dominant elements of the marks in issue, and that there is only a one letter difference between these elements in the respective marks. Weighing up all of these factors, I find the marks to be visually similar to a medium degree.

Aural Comparison

60. I consider that only the word elements within the marks in issue will be pronounced, the additional device element in the contested mark will not be articulated.
61. As outlined above, the marks share the same first five letters (“Lucky”), last two words (hot chicken), and an (“s”) prior to the word “hot chicken”. I consider that all of these elements will be pronounced identically in each of the marks. However, the contested mark also has a B immediately before the “s”, which is not present in the earlier mark. Whilst this creates a phonetic difference between the marks, as the beginning and the end of the marks in issue are the same, I consider the marks to be aurally similar to a high degree.

Conceptual Comparison

62. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU, including *Ruiz Picasso v OHIM*.¹⁸ The assessment must, therefore, be made from the point of view of the average consumer.
63. I am also conscious of the findings of the GC in *Usinor SA v OHIM*,¹⁹ that “as regards the conceptual comparison, it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him”.
64. In this instance, both marks contain the same first five letters (“Lucky) and final two words “hot chicken”. All of these words are standard dictionary words, with lucky being the bringing of good fortune, hot meaning a high temperature or strong, burning taste, and chicken being a bird or type of meat. In respect of the words “hot” and “chicken”, I consider that these standard definitions will be the meaning that the average consumer attributes to these words in both marks.
65. Whilst Lucky has the standard definition I have outlined above, it is presented in the earlier mark with an apostrophe and an s at the end of the word. This therefore makes it possessive, and grammatically results in Lucky being read as the owner of the two subsequent words (i.e., the “hot chicken”). For this reason, it is my view that the average consumer would identify “Lucky” in the earlier mark as a name, and as being the owner of the hot chicken.
66. I also note that the word Lucky in the contested mark is presented as “Lucky B’s”. The applicant submits that the phrase “Lucky B’s” is a recognised abbreviation of the full phrase “Lucky Bastards” which “would be known to the average

¹⁸ [2006] ECR I-643; [2006] E.T.M.R

¹⁹ Case T-189/05

consumer”. I do not accept that this is a common abbreviation of that phrase or that it would be known to the average consumer, and I have no evidence to support such a finding. Though, I do consider that “Lucky B” would be read by the average consumer as a name given the presence of the apostrophe and s after the B, which once again results in the words Lucky B being read as the owner of the subsequent hot chicken.

67. Consequently, I consider that the conceptual message conveyed by both marks would be hot chicken meat which is owned by either Lucky or Lucky B. I do not consider that the stylisation in the contested mark alters the conceptual meaning I have outlined above, and the presence of the chicken head device simply reinforces that conceptual meaning. Overall, I therefore consider that the marks are conceptually highly similar.

Distinctive character of the earlier trade mark

68. 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 C108/97 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).”

69. The opponent submits that it has been trading as “Lucky’s Hot Chicken” since “circa 2020”, and that it has numerous sites across London, but it has not filed any evidence of its actual use of the earlier mark during that period. Consequently, whilst the distinctiveness of a mark may be enhanced as a result of it having been used in the market, in this instance the opponent has filed no evidence of use, and I only therefore have the inherent position to consider.
70. Distinctiveness is a scale along which marks of various types sit. A mark which is allusive of the goods/services will have less distinctive character than one that is not; dictionary words will also be less distinctive than words which are entirely fanciful. However, all will turn on the particular facts. For example, there are “invented” words which are really just composites of two allusive words and only distinctive as a result, and dictionary words which are more or less common than others.
71. For the reasons outlined in paragraph 53 above, I consider the words “hot” and “chicken” to be descriptive or non-distinctive of the opponent’s goods and services, and I therefore consider that the distinctive character in the earlier mark lies in the word “Lucky’s”.
72. As acknowledged above, despite Lucky being a standard dictionary word with its own meaning, given the presence of the apostrophe and s, I consider the word Lucky in the earlier mark would be understood by the average consumer to be a name. The words hot chicken would be identified by the average consumer as having their standard dictionary meaning, which together would be a type of meat with a high temperature or strong, burning flavour, and Lucky would be identified as the owner of that “hot chicken”.

73. I note that in *Harman International Industries, Inc v OHIM*,²⁰ the CJEU stipulated the following:

“Although it is possible that, in a part of the European Union, surnames have, as a general rule, a more distinctive character than forenames, it is appropriate, however, to take account of factors specific to the case and, in particular, the fact that the surname concerned is unusual or, on the contrary, very common, which is likely to have an effect on that distinctive character. That is true of the surname ‘Becker’ which the Board of Appeal noted is common”.

74. Whilst I therefore recognise that, as a general rule, forenames are considered to be less distinctive, I also recognise that Lucky is not a common name in the UK. Consequently, overall, I find the earlier mark to be inherently distinctive to a medium degree.

75. It should also be noted that it is the distinctiveness of the common element (i.e., the word “Lucky”) which is key when assessing the likelihood of confusion: In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis KC as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark

²⁰ Case C-51/09P

alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

76. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out. In my view, the common element is distinctive to a medium degree.

Likelihood Of Confusion

77. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, whilst 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/services down to the responsible undertakings being the same or related.
78. 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 (see *SabeP*¹). The first is the interdependency principle i.e., a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa (see *Canon*²). It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods/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 he has retained in his mind.
79. I have found the applicant’s goods and services to be similar or identical to that of the opponent’s, and I note that, in any event, this has been conceded by the

²¹ C-251/95, para 22

²² C-39/97, para 17

applicant. I have also found that the marks are visually similar to a medium degree, aurally similar to a high degree, conceptually highly similar, and that the earlier mark has a medium degree of inherent distinctive character.

80. I have identified that the average consumers of the goods and services in issue would be members of the general public or professional consumers. I have also found that the level of attention paid will vary from medium to slightly higher than medium. I have also found that the purchasing process for all of the goods/services in issue would be primarily visual in nature, although I do not discount aural considerations.
81. Weighing up all of the above, noting the principle of imperfect recollection, and that consumers rarely have the opportunity to compare marks side by side, I am satisfied that the similarities between the marks in issue may result in the average consumer mistaking one mark for the other. For the avoidance on doubt, I even consider this to be the case for the services where I have found that professional consumers will pay a slightly higher degree of attention during the purchasing process. Whilst there are some presentational differences between the marks, I am conscious that I have found the words “Lucky’s” and “Lucky B’s” to be the dominant element of both marks. I am also conscious that there is a differing letter situated at the end of the dominant element of both marks but, as discussed above, the average consumer tends to focus on the beginning of marks. I also consider that the difference in the presence of the “B’s” will be offset by the identity/degree of similarity between the goods and services in issue. As such, overall, I am of the view that the presentational differences between the marks will be misremembered. Consequently, I consider there to be a likelihood of direct confusion between the marks.
82. Even if I am wrong in this finding, and the device/presentational elements of the marks are recalled, I still consider that the difference between “Lucky’s”/“Lucky B’s” is likely to be misremembered and the stylisation and device in the applicant’s mark are likely to be viewed as an alternative mark being used by the same or economically connected undertaking. Plainly, it is not uncommon for a business to use a word only version of their mark in some circumstances (such

as in text articles or on receipts) and a logo version in others (such as on signage or packaging). Consequently, I find there to be a likelihood of indirect confusion.

CONCLUSION

83. The opposition succeeds in full, and the contested mark is hereby, subject to any successful appeal of my decision, refused registration.

COSTS

84. As the opponent has been successful it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Note 1/2023. In the circumstances, I award the opponent the sum of £700 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee:	£100
Preparing a notice of opposition & considering the other side's statement:	£250
Preparing submissions-in-lieu of a hearing:	£350
<u>Total:</u>	<u>£700</u>

85. I therefore order Pollo Hub Franchising Ltd to pay Lord of the Wings Limited the sum of £700. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 31st day of October 2025

B Hartland
For the Registrar