

O/891/21

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003405720
BY ZAMIR HUSSAIN IN CLASSES 30, 39 AND 43**

**AND OPPOSITION THERETO
UNDER NO. 417955 BY JATINDER SINGH WASU**

**AND IN THE MATTER OF REGISTRATION NO. UK00003306679
IN THE NAME OF JATINDER SINGH WASU IN CLASSES 30, 39 AND 43**

**AND IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF
INVALIDATION THEREO UNDER NO. 503011 BY ZAMIR HUSSAIN**

**AND IN THE MATTER OF REGISTRATION NO. UK00003013345
IN THE NAME OF JATINDER SINGH WASU IN CLASSES 29, 30, 31 AND 32**

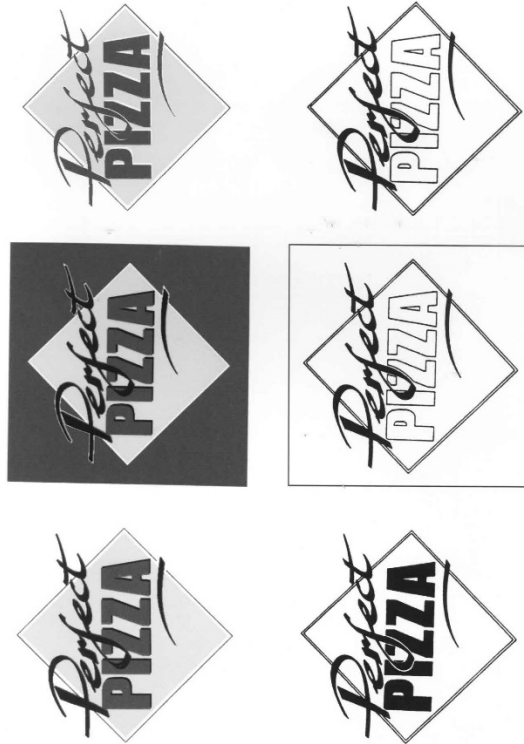
**AND IN THE MATTER OF AN APPLICATION FOR REVOCATION
THEREO UNDER NO. 503180 BY ZAMIR HUSSAIN**

**AND IN THE MATTER OF REGISTRATION NO. UK00002190267
IN THE NAME OF JATINDER SINGH WASU IN CLASSES 30, 39 AND 42**

**AND AN APPLICATION FOR REVOCATION THERETO
UNDER NO. 503181 BY ZAMIR HUSSAIN**

BACKGROUND AND PLEADINGS

1. On 10 June 2019, Zamir Hussain applied to register the following trade mark in the UK under application no. 3405720 (“the 720 Mark”):



2. The application for the 720 Mark was published on 5 July 2019 and registration is sought for the following goods and services:

Class 30 Preparations made from cereals; Bread; Cakes; Pizza; Preparations made from cereals; Puddings; Sandwiches; Sauces; Pasta; Pies.

Class 39 Transport and delivery of food and drink; Transport and delivery of goods.

Class 43 Bar services; Catering for the provision of food and drink; Take away food services; Restaurant services; Preparation of food and drink.

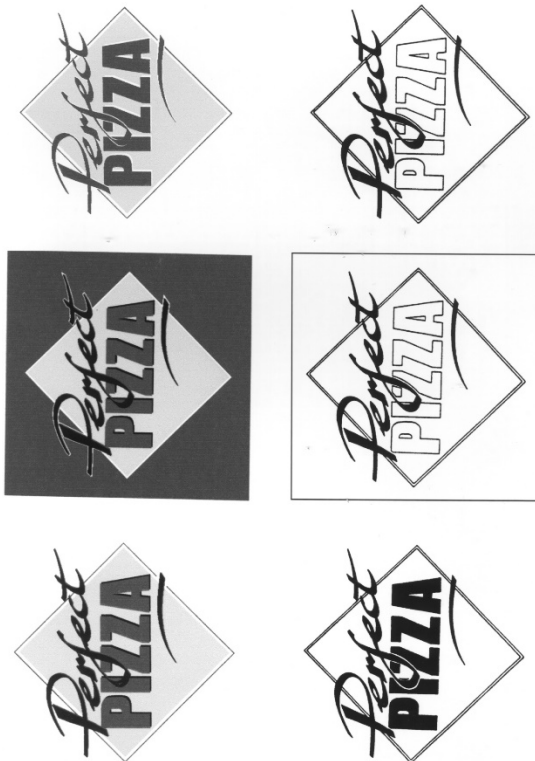
3. On 4 October 2019, Jatinder Singh Wasu opposed the application based upon sections 5(1), 5(2)(b), 5(3), 5(4)(a) and 3(6) of the Trade Marks Act 1994 (“the Act”). Under section 5(1), Mr Wasu relies upon the following trade marks:



UK no. 3306679 (series of 3) (“the 679 Mark”)

Filing date 26 April 2018; registration date 31 August 2018

Relying upon all goods and services as set out in the Annex to this decision



UK no. 2182923 (“the 923 Mark”)

Filing date 25 November 1998; registration date 30 June 2000

Relying upon all goods and services as set out in the Annex to this decision

4. However, the 923 Mark was cancelled with effect from 1 August 2016 following successful revocation proceedings brought by Mr Hussain (“the earlier revocation proceedings”). Consequently, the opposition based upon section 5(1) of the Act proceeds on the basis of the 671 Mark only.

5. Under section 5(2)(b), Mr Wasu relies upon the following trade marks:

PERFECT PIZZA

UK no. 2190267 (“the 267 Mark”)

Filing date 26 February 1999; registration date 30 January 2004

Relying upon all goods and services as set out in the Annex to this decision



UK no. 2605544 (series of 3) (“the 544 Mark”)

Filing date 23 December 2011; registration date 6 July 2012

Relying upon all goods and services as set out in the Annex to this decision

THE PERFECT PIZZA COMPANY

UK no. 2605551 (“the 551 Mark”)

Filing date 23 December 2011; registration date 6 July 2012

Relying upon all goods and services as set out in the Annex to this decision

PERFECT PIZZA MAKE IT PERFECT

UK no. 3013345 (“the 345 Mark”)

Filing date 10 July 2013; registration date 21 February 2014

Relying upon all goods and services as set out in the Annex to this decision

6. Mr Wasu claims that there is a likelihood of confusion because the parties’ respective trade marks are similar and the goods and services are identical or similar.

7. Under section 5(3) of the Act, Mr Wasu relies upon the 267 Mark and the 544 Mark. Mr Wasu relies upon some of the goods and services for which those marks are registered as underlined in the Annex to this decision. Mr Wasu claims that use of the applied-for marks would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character and/or reputation of the earlier marks.

8. Under section 5(4)(a) of the Act, Mr Wasu relies upon the following signs:



Mr Wasu claims to have used this sign throughout the UK since 1998.

PERFECT PIZZA

Mr Wasu claims to have used this sign throughout the UK since 1998.



Mr Wasu claims to have used this sign throughout the UK since 2012.

9. Mr Wasu claims to have used all of the signs in relation to “food and beverage; transport and delivery of food and beverages; take-away food services; restaurant services; preparation of food and drink; catering services for the provision of food and drink”.

10. Under section 3(6), Mr Wasu claims that Mr Hussain has applied for the 720 Mark in bad faith because he is “a previous franchisee of [Mr Wasu’s] predecessor in title,

who should have stopped use of the opposed mark once he stopped being a franchisee but failed to do so. He is also aware of [Mr Wasu's] earlier rights.”

11. Mr Hussain filed a counterstatement denying the claims made and putting Mr Wasu to proof of use of the 267 Mark and the 679 Mark.

12. On 3 February 2020, Mr Hussain applied to invalidate the 679 Mark pursuant to section 47 of the Act. Mr Hussain relies upon sections 5(4)(a), 3(3)(a) and 3(6) of the Act. Under section 5(4)(a) of the Act, Mr Hussain relies upon the following signs:



13. Mr Hussain claims to have been using these signs throughout the UK since 13 February 2003 in relation to “coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; edible ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice etc.” in class 30, “transport; packaging and storage of goods; travel arrangement etc” in class 39 and “services for providing food and drink; temporary accommodation etc” in class 43.

14. Under section 3(6), Mr Hussain states that 1) Mr Wasu was aware that there were ongoing revocation proceedings between the parties at the time of filing the application which were on the grounds of non-use and 2) Mr Wasu was aware of Mr Hussain's rights to the applied-for mark. Consequently, Mr Hussain claims that the application was made in bad faith.

15. I will return to the scope of the section 3(3)(a) claim below.

16. Mr Wasu filed a counterstatement denying the claims made.

17. On 20 May 2020, Mr Hussain applied to revoke the 345 Mark and 267 Mark on the grounds of non-use pursuant to section 46(1)(b) of the Act. Mr Hussain claims non-use in respect of the 345 and 267 Marks for the following periods:

- a. 2 April 2012 to 1 April 2017, claiming an effective date of revocation of 2 April 2017;
- b. 23 December 2013 to 22 December 2018, claiming an effective date of revocation of 23 December 2018;
- c. 6 July 2014 to 5 July 2019, claiming an effective date of revocation of 6 July 2019.

18. Mr Wasu filed counterstatements denying the claims made.

19. A hearing took place before me, by video conference, on **5 October 2021**. Mr Hussain represented himself (assisted by Mr Abbas) and Mr Wasu was represented by Mr Graham Johnson of Appleyard Lees IP LLP. Both parties filed skeleton arguments in advance of the hearing.

EVIDENCE AND SUBMISSIONS

20. Mr Hussain filed evidence in the form of his own witness statements dated:

- a. 30 October 2020 (accompanied by 9 exhibits);
- b. 18 January 2021 (accompanied by 10 exhibits);
- c. 4 January 2021; and

d. 4 January 2021 (filed on 4 April 2021) (accompanied by 6 exhibits).

21. Mr Wasu filed evidence in the form of:

a. The witness statement of Graham Pierssene Johnson dated 30 October 2020 (accompanied by 6 exhibits). Mr Johnson is the trade mark attorney acting on behalf of Mr Wasu in these proceedings;

b. His own witness statement dated 17 November 2020 (accompanied by 9 exhibits);

c. The witness statement of Simon Meyeri dated 4 January 2021 (accompanied by 2 exhibits). Mr Meyeri is a director of Cobalt Cat Media Ltd who have been instructed by Mr Wasu to undertake various marketing activities;

d. The second witness statement of Mr Meyeri dated 18 January 2021 (accompanied by 11 exhibits);

e. His own witness statement dated 18 January 2021 (accompanied by 5 exhibits);
and

f. His own witness statement dated 1 April 2021 (accompanied by 2 exhibits).

22. Mr Wasu also filed written submissions dated 30 October 2020 and 18 January 2021.

23. I have taken the evidence and submissions into account in reaching my decision. Whilst I do not propose to summarise them here, I will refer to them below where necessary.

APPLICABILITY OF EU LAW

24. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in

accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

PRELIMINARY ISSUES

25. Mr Hussain has raised the question of whether Mr Wasu is permitted to run his business under the marks in issue because, Mr Hussain states, he “voluntarily declared insolvent” in 2015. As a result, Mr Hussain states that he is prohibited from operating a business under the same or similar name for a period of 5 years. Mr Abbas made brief submissions on this at the hearing. For the avoidance of doubt, this is not a matter for this Tribunal to decide and will not influence the outcome of this decision.

26. At the hearing, Mr Abbas suggested that parts of Mr Wasu’s evidence had been altered to be more beneficial to his case. I have seen no evidence to suggest that that is the case and no request was made for cross-examination. The evidence in question was accompanied by a statement of truth. Consequently, I see no reason to doubt its reliability.

DECISION

27. As the relationship between the parties is relevant to various aspects of this decision, I will begin by setting out my findings in relation to this aspect of the case.

THE RELATIONSHIP BETWEEN THE PARTIES

28. A franchise agreement has been provided which is dated 13 February 2003.¹ The parties to the agreement are Perfect Pizza Limited and Zaheer Hussain. The agreement grants Zaheer Hussain the right to operate a franchise business using the mark PERFECT PIZZA and associated marks (although the agreement does not state what these are). It goes on to state:

¹ Exhibit GPJ6

“14.1 The Franchisee shall use the Trade Name and the Trade Marks only in connection with the operation of the Said Business and only in the form and manner approved by the Franchisor from time to time.

14.2 The Franchisee shall not use the Trade Marks in any way which may prejudice their distinctiveness or their reputation or the Goodwill including not using the Trade Names the Trade Marks or the Future Trade Marks (as defined in clause 14.5) in a generic manner.

[...]

14.4 In no circumstances shall the Franchisee apply for registration as proprietor of the Trade Name or the Trade Marks or any or part of them or any mark which would conflict with the Trade Name or the Trade Marks or use or apply for any mark which is identical with or similar to the Trade Marks or the Trade Name so as to amount to infringement or passing off nor shall the Franchisee take any action which may be detrimental to the reputation of the Trade Marks or put any registrations or applications to register at risk.

[...]

18.1 On the termination of this Agreement the Franchisee will immediately discontinue the use of the Trade Name the Trade Marks the Future Trade Marks signs cards notices and other display or advertising matter indicative of the Franchisor or of any association with the Franchisor or of the Said Business or Approved Products of the Franchisor and will make or cause to be made such changes in signs cards notices and other display or advertising matter buildings and structures as the Franchisor shall direct so as effectively to distinguish the PERFECT PIZZA OUTLET from its former public “get up” and marketing image”

29. At the hearing, Mr Hussain noted that he is not a named party to the franchise agreement; he stated that Zaheer Hussain is, in fact, his brother. Mr Johnson has

provided a copy of a witness statement given by Mr Hussain in previous proceedings before the Registry. In this statement, Mr Hussain states:

“We have been one of the Franchisee of Perfect Pizza, since, 13th February 2003. The company, Aspire Cuisine Limited by Perfect Pizza Limited entered into a franchise Agreement with Zaheer Hussain as the franchisee. The Agreement granted the franchisee an inclusive licence to use the Perfect Pizza Cancellation Trademark No. UK00002182923 with inclusive right to distribute and sale [sic] the goods and services under Perfect Pizza and Trademark, at 283 Barking Road London E13 8EQ. Due to financial reasons the agreement came to an end in around 2008/9.

Since then, we have been selling, serving and trading with our customers at our store as well as through our online website, under the business name of “Perfect Pizza” and with the Cancellation Trademark No. UK00002182923. In addition to this, the store has been trading under the name “Perfect Pizza” for around 10 years before we took over the store, at the same address of 283 Barking Road, London, E13 8EQ.”² (my emphasis)

30. It seems to me that, whilst Mr Hussain is not a named party in the franchise agreement, he considered himself bound by its terms. At the hearing, it was accepted that Mr Hussain was involved in the franchise business being operated under that agreement. Further, it is clear from his witness statement, referred to above, that he viewed himself as being involved in the running of the business under the franchise agreement. I will return to the relevance of this below.

31. I will now turn to assessing the revocation for non-use grounds.

THE REVOCATIONS

32. Section 46 of the Act states:

² Exhibit GPJ4

“(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) [...]

(b) that such use had been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

[...]

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

33. Section 100 is also relevant, which reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

34. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark,

including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

35. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is not, therefore, genuine use.

36. Revocation no. 503180 is directed against the 345 Mark and revocation no. 503181 is directed against the 267 Mark. The periods of non-use claimed for both are the same i.e. 2 April 2012 to 1 April 2017, 23 December 2013 to 22 December 2018 and 6 July 2014 to 5 July 2019 respectively.

Form of the mark

37. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union (“the CJEU”) found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestle*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition of a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

38. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was), sitting as the Appointed Person, summarised the test under section 46(2) of the Act as follows:

"33. ...The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

39. Although this case was decided before the judgment of the CJEU in *Colloseum*, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.

40. Clearly, where the 267 Mark has been used as registered to indicate trade origin that will be use upon which Mr Wasu may rely. I will return to this point below, when

considering sufficient use. I have seen no evidence of use of the 345 Mark as registered.

41. I note the following marks have also been used:



42. Registration of the word only mark PERFECT PIZZA (as is the case for the 267 Mark) will cover use in any standard typeface or font. Consequently, I consider 2 and 3 to be use of the 267 Mark as registered. The words PERFECT PIZZA are also clearly visible within examples 1 and 4. However, I need to consider whether the addition of the words THE and COMPANY to the beginning and end of the marks mean that the words PERFECT PIZZA no longer have an independent distinctive role within the mark. I accept that the words THE and COMPANY are non-distinctive additions. However, I consider that the words PERFECT PIZZA are also non-distinctive. The addition of the words THE and COMPANY change the meaning of the mark from one which refers to a business to one which describes the goods. Consequently, I do not consider that the examples at 1 and 4 are acceptable use of the mark as per *Colloseum* and *Nirvana*.

43. Turning to the question of whether the use of these marks above constitutes acceptable use of the 345 Mark, I bear in mind that it is only in example 1 that the words PERFECT PIZZA MAKE IT PERFECT can be seen. However, for the same reasons set out above, I consider that the addition of the words THE and COMPANY mean that this is not use of the 345 Mark as per *Colloseum* and *Nirvana*.

44. In my view, the distinctive character of the 345 Mark lies in the words PERFECT PIZZA MAKE IT PERFECT as a whole. Consequently, the absence of some of these words from the examples 2 and 3 will alter the distinctive character of the mark. Consequently, I do not consider this to be use of the 345 Mark upon which Mr Wasu can rely as per *Nirvana*.

Sufficient Use

45. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself³.

46. I have seen no evidence of use of the 345 Mark as registered and none of the examples shown above are acceptable variants. Consequently, I do not consider that Mr Wasu has demonstrated genuine use in relation to that mark.

47. In relation to the 267 Mark, there is very little evidence of use. I note that Mr Wasu's website (perfectpizza.co.uk) allows customers to place orders with various franchise stores and Mr Wasu gives evidence that it has been in operation for over 20 years. I note that in April 2012, the website displayed this mark in a form that I have found to be acceptable use of the mark as registered.⁴ However, by 2013, that mark had been replaced with THE PERFECT PIZZA COMPANY logo. Whilst the domain name continued to refer to PERFECT PIZZA, it is clear that the sign being used to indicate origin when customers landed on that website had been updated to refer to THE PERFECT PIZZA COMPANY. Similarly, in November 2012, there is an example of

³ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

⁴ Exhibit JWA1

the same acceptable device being used on the front of the Stevenage store.⁵ However, the evidence shows that this was subsequently updated to reflect the new THE PERFECT PIZZA COMPANY logo. An invoice addressed to Mr Hussain's business from February 2012 displays the acceptable device referred to above, however, subsequent invoices have been updated to reflect the new logo.⁶ I have no annual turnover figures.

48. I note that the domain name is displayed clearly on some of the store fronts of the franchisees, as shown below:



(July 2019 – Perfect Pizza Chiswick)



(May 2019 – Perfect Pizza Guildford)

⁵ Exhibit JWA2

⁶ Exhibit ZH10



(June 2018 – Perfect Pizza Portsmouth)



(October 2016 – Perfect Pizza Leamore)

However, all of these appear alongside THE PERFECT PIZZA COMPANY logo, which is, in my view, what the average consumer will view as indicating trade origin.

49. I have also noted the following use of the words PERFECT PIZZA:⁷

⁷ Exhibit GPJ3



(7 June 2019 – Perfect Pizza Stevenage)

However, the fact that the words PERFECT PIZZA appear beneath the words PERFECT CHICKEN, in my view, means it is unlikely that these words will be viewed as indicating trade origin. I consider that these words are likely to be viewed descriptively and that it is the logo which appears alongside the words, which will be seen as indicating trade origin.

50. A leaflet which can be dated 2012 by virtue of a competition with a closing date of March 2012 displays THE PERFECT PIZZA COMPANY logo and states:

“ALL CHANGE We’ve changed our logo, our colours and even introduced a new pizza base. We think it’s a change for the better”.⁸

51. This evidence as a whole creates a picture which is in line with Mr Hussain’s evidence that Mr Wasu re-branded his business from PERFECT PIZZA to THE PERFECT PIZZA COMPANY at the end of 2011/early 2012 and instructions were issued to franchisees to reflect the new branding at their premises.

52. The majority of use after the re-brand in 2011/2012 appears to relate to the Fordhouses store in Wolverhampton. I note that there are examples of the PERFECT

⁸ Exhibit ZH1-5

PIZZA diamond device continuing to be used on the front of that store in 2015, 2017 and 2018.⁹ For example:



(15 February 2015 – Perfect Pizza Fordhouses)













53. However, I note that by 2017, the interior of the store had been redecorated with THE PERFECT PIZZA COMPANY logos.¹⁰ Documents from this store (such as till receipts) from 2018 continue to refer to PERFECT PIZZA or PERFECT PIZZA FORDHOUSES.¹¹ There are also examples of marketing materials from that store which Mr Meyeri dates as 2018/2019 which display the PERFECT PIZZA diamond logo at the end, and THE PERFECT PIZZA COMPANY device at the beginning.¹² The difficulty with this evidence is identifying the correct dates on which these documents were issued. I note that in his statement, Mr Meyeri states that the front page of each of the exhibits confirms the dates on which they were issued. These appear as follows:

⁹ Exhibits GPJ2 and GPJ3













¹⁰ Exhibit ZH9

¹¹ Exhibit ZH10

¹² Exhibits SMB10 and SMB11

	2018-01 PPFordhouses Happy New Ye...	13/01/2021 18:40	PDF Document	194 KB
	2018-02 PPFordhouses Valentines	14/01/2021 11:22	PDF Document	289 KB
	2018-03 PPFordhouses	14/01/2021 11:22	PDF Document	332 KB
	2018-04 PPFordhouses	14/01/2021 11:22	PDF Document	352 KB
	2018-05 PPFordhouses	14/01/2021 11:22	PDF Document	309 KB
	2018-06 PPFordhouses Watching The ...	14/01/2021 11:22	PDF Document	385 KB
	2018-07 PPFordhouses Come on Engl...	14/01/2021 11:22	PDF Document	391 KB
	2018-08 PPFordhouses The Wolves Ar...	14/01/2021 11:22	PDF Document	321 KB
	2018-09 PPFordhouses National Borin...	14/01/2021 11:22	PDF Document	410 KB
	2018-10 PPFordhouses Dreading The...	14/01/2021 11:22	PDF Document	556 KB
	2018-11 PPFordhouses Need Help H...	14/01/2021 11:22	PDF Document	471 KB
	2018-12 PPFordhouses Merry Christ...	14/01/2021 11:22	PDF Document	571 KB

(Exhibit SMB10)

	2019-01 PPFordhouses How Is Your H...	14/01/2021 11:22	PDF Document	509 KB
	2019-02 PPFordhouses Are You Feeli...	14/01/2021 11:22	PDF Document	405 KB
	2019-03 PPFordhouses Please the Pic...	14/01/2021 11:22	PDF Document	449 KB
	2019-04 PPFordhouses Say No to the...	14/01/2021 11:22	PDF Document	374 KB
	2019-05 PPFordhouses happy easter	14/01/2021 11:22	PDF Document	382 KB
	2019-06 PPFordhouses A Feast for Ch...	14/01/2021 11:22	PDF Document	455 KB
	2019-07 PPFordhouses Bring a Little ...	14/01/2021 11:22	PDF Document	392 KB
	2019-08 PPFordhouses Enjoy the Lon...	14/01/2021 11:22	PDF Document	594 KB
	2019-09 PPFordhouses Celebrate the ...	14/01/2021 11:22	PDF Document	380 KB
	2019-10 PPFordhouses Treat Yourself ...	14/01/2021 11:22	PDF Document	555 KB
	2019-11 PPFordhouses Put your feet ...	14/01/2021 11:22	PDF Document	651 KB
	2019-12 PPFordhouses Chicken in th...	14/01/2021 11:22	PDF Document	476 KB

(Exhibit SMB11)

54. However, all of the documents are listed as having been issued in 2021, which is contrary to Mr Meyeri's narrative evidence that they were issued in 2018/2019. I note that all of the documents display a copyright date of 2018. I note that one of these documents refers to the FIFA World Cup 2018 which took place between June and July of that year. I note that the earlier revocation proceedings were commenced in January 2018, so this use would have been after Mr Wasu became aware of the fact that his registration was subject to challenge.

55. I note that the words PERFECT PIZZA are also visible on social media (in combination with a particular place name) as the name of various Facebook pages for each of the stores throughout the relevant period.¹³

56. It seems to me, therefore, that the evidence of use that has been provided dated during the relevant periods in relation to the 267 Mark (or acceptable variants thereof) relates predominantly to the Fordhouses store. In considering whether this use amounts to genuine use, it is important to assess whether the evidence as a whole presents a picture of real commercial exploitation of the mark, including whether the use is warranted in the economic sector concerned to maintain or create a share in the market. Clearly, the Fordhouses store did not rebrand in 2011/2012 in the same way as the other stores. The continued use of this signage at the Fordhouses store has been considered by a previous hearing officer in case BL O/248/19 (which was upheld on appeal), who found that:

“40. Does the fact that the signage is there, nevertheless, constitute trade mark use according to the essential function of trade marks which is to enable customers to distinguish the goods and services of one undertaking from another? Mr Wasu’s position is that the external signage plays a key role in attracting customers. However, taking into account all the relevant facts and circumstances, I do not agree with that view. Certainly, after February 2012, the attention of consumers were being directed to the new mark. Mr Wasu (or predecessors-in-title) did nothing to draw attention to the contested mark other than to say that it had changed to the new mark. This does not indicate a business endeavoring to create or maintain a market share in relation to the contested mark. This is very low-key use, coupled with the very geographically limited use shown in the evidence, is insufficient to constitute real commercial exploitation of the contested mark in the UK market for these particular goods and services. I, therefore, find that Mr Wasu has not shown that the contested mark was put to genuine use in the UK after February 2012.”

¹³ Exhibit GPJ2

57. This aligns with my own view in the present case. It seems to me that from early 2012 up to at least 2018, there was no attempt by Mr Wasu or his business to create or maintain a market share in relation to the 267 Mark. Clearly, there had been a conscious decision to rebrand and it seems likely that any continued use on the store front of the Fordhouses store was simply down to inaction rather than a real attempt to exploit the mark.

58. I have already identified difficulties in dating the promotional materials issued by the Fordhouses store referred to above. Although Mr Meyeri dates these as being between 2018/2019 in his narrative evidence, this is not confirmed in the covering document as he indicated that it would be. I note that similar documents from 2016 and 2017 display only THE PERFECT PIZZA COMPANY logo.¹⁴ In any event, of those materials that do refer to the 267 Mark (or an acceptable variant thereof), even if they were issued in 2018/2019, they are very small scale and remain limited to one particular store, meaning a limited geographical area of use. No information is provided about how many recipients these documents were circulated to.

59. Taking the evidence as a whole into account, I am not satisfied that Mr Wasu has demonstrated genuine use of the 267 Mark during the relevant periods.

60. Consequently, the applications for revocation against the 267 and 345 Marks succeed in their entirety.

THE INVALIDATION

61. I will now turn to the invalidation brought by Mr Hussain. I remind myself that the invalidation is directed against the 679 Mark and that Mr Hussain relies upon sections 5(4)(a), 3(3)(a) and 3(6) of the Act. The 679 Mark is a series of 3 trade marks which appear as follows:

¹⁴ Exhibit SMB2



Section 3(3)(a)

62. In his Form TM26(I), Mr Hussain states:

“The Applicant’s intention at the time of filing the application. The Application’s [sic] is a subjective factor which must be determined by reference to the objective circumstances of in [sic] this particular case.

However, that the section 3/6 which clearly describes or provides, “A Trade Mark shall not be registered if or to the extent that the application is made in bad faith.

Also contrary to section 3(3)(a). A trade mark shall not be registered if it is –

(a) Contrary to public policy or to accepted principles of morality.

Therefore, also, Section 47(1) provides that, for example, the application to seeks [sic] to Registrar [sic] the trade mark of a third party with whom or of whom he is otherwise aware in the United Kingdom, an Applicant for a United Kingdom Trade Mark is required to state “that the trade mark is being used, in relation to goods and services applied for or that he has a bona fide intention, this statement must be confirmed by a statement of truth on the application form.

As well as “The Registrar may apply to the court for a declaration of invalidity of the registration on the ground of bad faith under Section 47(4). Stated that, The Registrar himself may apply to the court for a declaration of invalidity of the trade mark on the bases [sic] of bad faith.”

63. At the hearing, I noted that neither party has made any detailed submissions in relation to this ground. Further, I noted that the arguments made seemed more akin to a bad faith pleading than a pleading properly made under section 3(3)(a). Mr

Hussain confirmed that he was content not to pursue the invalidation under this ground. Consequently, I need consider it no further.

64. However, for the avoidance of doubt, I would not have found the registration to be objectionable under this ground. This ground is concerned with the intrinsic qualities of the mark, not the conduct of the proprietor or the way in which the mark is used. Mr Hussain has not identified anything about the mark itself which would render it contrary to public policy or acceptable principles of morality. I do not consider there to be any merit in this ground of invalidation as pleaded.

65. The invalidation based upon section 3(3)(a) of the Act is dismissed.

Section 5(4)(a)

66. Under section 5(4)(a), Mr Hussain relies upon the following signs:



67. 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”.

68. 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.”

69. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “a substantial number” of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

Relevant date

70. Whether there has been passing off must be judged at a particular point (or points) in time. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, sitting as the Appointed Person, considered the relevant date for the purposes of s.5(4)(a) of the Act and stated as follows:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”

71. The prima facie relevant date is the date of the application for the 679 Mark i.e. 26 April 2018. However, Mr Wasu claims that his use of the 679 Mark pre-dates the application date. Mr Wasu claims to have started using the PERFECT PIZZA logo as early as 1998. This does not appear to be disputed by Mr Hussain. Indeed, Mr Hussain accepts that his own business has been using the diamond logo device since 2003. As a result, it seems clear to me that an earlier relevant date would have arisen by 2003 (at the latest).

Goodwill

72. The House of Lords in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL) provided the following guidance regarding goodwill:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a

business. It is the attractive force which brings in customers. It is the one thing which distinguishes an old-established business from a new business at its first start.”

73. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark* [1969] R.P.C. 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

74. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any

absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

75. Mr Hussain has filed use of the signs relied upon as follows:

- a. Screenshots of a website which show use of the following sign on perfectpizza.com, dated October 2020;¹⁵



- b. An image of a storefront in London dated April 2019, which shows use of the same sign;¹⁶
- c. A selection of menus, flyers and promotional materials, some of which display the same sign, only two of which appear to be dated (by promotional offers which end in 2020);¹⁷
- d. Photographs of the same sign in use on goods such as clothing, hats, pizza boxes and bags, but none of these are dated;¹⁸
- e. Online collection order forms dated 2020 issued by a supplier to Mr Hussain's business;¹⁹

¹⁵ Exhibit ZH5 and ZH6

¹⁶ Exhibit ZH6

¹⁷ Exhibit ZH7

¹⁸ Exhibit ZH7

¹⁹ Exhibit ZH7 and ZHC3

- f. Correspondence from Barclaycard and Lloyds Bank addressed to Mr Hussain's business, both of which are dated 2020;²⁰
- g. A series of NatWest bank statements dated 2014 to 2017, and 2020.²¹ Some of these dated 2020 show an account name of "Perfect Pizza". The earlier statements show an account name of "R Adil Khan trading as Perfect Pizza". It is not clear to me what relationship this individual has with Mr Hussain's business and no explanation is given by Mr Hussain. I note that up until 2015, no money is paid into the bank account. After that time, between £1,600 and £12,250 were paid in per month. The statements for 2014 to 2017 show a balance at the end of each period of between approximately -£13 and £360.
- h. Two invoices issued by ZPOS to Mr Hussain's business relating to the periods November and December 2018.²² It is not clear to me what these invoices relate to.
- i. Various emails from the ZPOS Finance Team, the earliest of which is dated July 2018;²³
- j. Documents relating to the refusal of a licence application for Perfect Pizza dated 2016;²⁴
- k. Various sales documents issued by third parties which appear to show a number of takeaways having been ordered from Perfect Pizza.²⁵ These are dated 2015 and 2016. Mr Hussain is not named on any of the documents; rather they are mainly addressed to two different individuals. No information is provided about what relationship these individuals have to Mr Hussain. The monthly website sales shown are between approximately £10 and £900 per month.

²⁰ Exhibit ZH7

²¹ Exhibit ZHC1

²² Exhibit ZHC2

²³ Exhibit ZHC2

²⁴ Exhibit ZHC2

²⁵ Exhibit ZHC2

- l. A letter sent by a third party to “Business Rates” dated 2015, which displays the same sign shown above and references the same business address. No information is provided about the relationship between the third party and Mr Hussain.

- m. Various bills dated 2019 and 2020;²⁶

- n. Orders placed through Hungry House addressed to a third party at Perfect Pizza.²⁷ Again, no reference is made to what relationship this third party has to Mr Hussain. The documents are dated between 2015 and 2017 and show sales per month of between approximately £130 and £8,000.

- o. Similar documents from between 2014 and 2018 in relation to JustEat show orders amounting to approximately between £400 and £11,100 per fortnight.²⁸

76. Some of these documents are dated after the prima facie relevant date and so will not assist Mr Hussain in demonstrating goodwill prior to that date. As set out above, Mr Hussain was involved in a business operated under a franchise agreement from 2003 onwards. Whilst it is not clear to me who the third parties referred to in the evidence are, or what relationship they have with Mr Hussain, I see no reason to conclude that any goodwill generated by their activities would have accrued to Mr Hussain rather than Mr Wasu. I note that Mr Hussain claims that the franchise agreement came to an end in 2008/2009. However, even if this is the case, the terms are clear that upon termination use of the marks covered by that agreement must cease. Consequently, as this is use that Mr Wasu would have been entitled to prevent under the terms of the franchise agreement, I do not consider that it is use upon which Mr Hussain can rely to demonstrate goodwill. In any event, any such use would have been use after the earlier relevant date and so does not assist Mr Hussain. I do not consider that Mr Hussain had established the requisite goodwill or that the signs relied upon had become distinctive of his goodwill at the relevant dates.

²⁶ Exhibit ZHC3

²⁷ Exhibit ZHC3

²⁸ Exhibit ZHC4 to ZHC6

77. The application based upon section 5(4)(a) of the Act is dismissed.

Section 3(6)

78. Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

79. In *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121 the Court of Appeal considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07 EU:C:2009:361, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, EU:C:2013:435, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, EU:C:2019:724, *Hasbro, Inc. v EUIPO, Kreativni Dogaaji d.o.o. intervening*, Case T-663/19, EU:2021:211, *pelicantravel.com s.r.o. v OHIM, Pelikan Vertriebsgesellschaft mbH & Co KG (intervening)*, Case T-136/11, EU:T:2012:689, and *Psytech International Ltd v OHIM, Institute for Personality & Ability Testing, Inc (intervening)*, Case T-507/08, EU:T:2011:46. It summarised the law as follows:

“68. The following points of relevance to this case can be gleaned from these CJEU authorities:

1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can be relied on before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].

2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].

3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of trade mark law, i.e. the course of trade and having regard to the objectives of the law

namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin: *Lindt* at [45]; *Koton Mağazacılık* at [45].

4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacılık* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54]".

80. The correct approach to the assessment of bad faith claims is as follows. According to *Alexander Trade Mark*, the key questions for determination in such a case are:

(a) What, in concrete terms, was the objective that the trade mark applicant has been accused of pursuing?

(b) Was that an objective for the purposes of which the contested application could not be properly filed? and

(c) Was it established that the contested application was filed in pursuit of that objective?

81. It is necessary to ascertain what the applicant knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani*

(Grosvenor Street) Limited and others, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

82. In this case, the relevant date is the date of the application for the 679 Mark i.e. 26 April 2018.

83. In his Form TM26(I), Mr Hussain states as follows:

“3. Facts regarding registration mark UK00003306679. Trade marks is related to earlier revoked mark UK00002182923 – CA000501937. I have filed an application on grounds of non usage and succeed, which was announcing on dated: on 13-05-2019 in addition to appeal judgment has being announced on dated 08-04-2020 with upheld.

4. Consequently, in the meantime of revocation he (Mr Wasu) has registered it again and merely gets a new registration number UK00003306679. Both of the registered trademarks are same identical/similar and has been registered on different dates. I could file my application before, the reason I couldn't file my application is because the decision was pending, which announced on dated 13-05-2019 and appeal decided on dated 08-04-2020 with uphold.

5. In view of the fact there is an onus on the opponents when registrant seeking to register a trade mark which he knows the mark is using to another (by applicant) and also fully aware that, the cancellation proceeding is underway by the applicant. Even though, registered owner (Mr Wasu) renewed the Trademark No. UK00002182923 – CA000501937 which is identical/similar to Earlier Registered Mark: UK00003306679.

6. So, in this circumstances that the registrant (MR Wasu) have been absolutely aware of the earlier right and earlier trade mark (which applied for registration by the applicant UK00003405720), this is similar to the applicants' presently exercising trade mark. Consequently, it is clear here the registrant/opponent absolutely aware of the applicant earlier right and opponent continued to be registering the identical mark which is already registered by the opponent (Mr

Wasu). Therefore, all of the relevant factors of the case are considering it is clear that the registration of the mark UK00003306679 has been made in bad faith.”

84. Part of Mr Hussain’s bad faith argument seems to be that Mr Wasu was aware that Mr Hussain had rights in the marks in issue and, therefore, should not have filed the application for the 679 Mark. I have already found, for the reasons set out above, that Mr Hussain did not have any goodwill in the 679 Mark (or a mark similar) at the relevant date. Consequently, he cannot possibly rely upon earlier unregistered rights for the purposes of a bad faith claim.

85. The second part of Mr Hussain’s bad faith argument seems to be that Mr Wasu should not have applied for the 679 Mark (which is identical or similar to, and relates to identical or similar goods/services to, the earlier mark that was subject to revocation proceedings brought by Mr Hussain in 2018).

86. The 679 Mark is similar to the mark Mr Hussain refers to which was the subject of the earlier revocation proceedings. The 679 Mark is a series of 3 Marks, as follows:



87. The mark subject to the earlier revocation proceedings was a series of 6 marks, including each of the above marks.

88. The 679 Mark is registered for a broader range of goods and services than the earlier revoked mark, although there is undoubtedly significant overlap in their specifications both, broadly, being pizza and other food items in class 30, transport and food delivery services in class 39 and services for providing food and drink in class 43.

89. The 679 Mark was applied for on 26 April 2018 and registered on 31 August 2018. The earlier revocation proceedings were commenced on 12 January 2018, the TM8 was filed on 27 April 2018, the Hearing Officer's decision was issued on 13 May 2019 and the appeal decision was issued on 8 April 2020. This means that Mr Wasu did not know what the outcome of the revocation proceedings would be at the time of filing the 679 Mark. However, he would have been aware that Mr Hussain's application for revocation had been issued.

90. The repeat filing of a similar/identical trade mark for similar/identical goods/services does not amount to bad faith per se. For example, a business may be about to recommence trade under a particular sign and, therefore, wish to re-register to ensure they have protection in that mark. However, this may amount to bad faith where it is part of a course of action intended to frustrate the requirements upon trade mark owners to use their marks within five years of registration.²⁹

91. In this case, the sequence of events is important. The application for the 679 Mark was made one day before the filing of the TM8 in the earlier revocation proceedings. Clearly, by that time, Mr Wasu was on notice that his earlier mark was vulnerable to revocation and was the subject of revocation proceedings brought by Mr Hussain. In my view, these circumstances give rise to a rebuttable presumption of lack of good faith. Consequently, it is for Mr Wasu to provide a plausible explanation of the objectives and commercial logic pursued by the application.

92. At the hearing, Mr Johnson submitted that:

“[Mr Wasu] has increased use [of the diamond logo]. It appears on marketing material that goes out. It is one of those things. It's a co-branding exercise, really. It is not uncommon that someone has a view to having a new mark, a legacy mark and continued use of that legacy mark because that is the one that customers are wedded to. [...] It is not something that is unusual and it is certainly not an act of bad faith for him to be undertaking in doing that.”

²⁹ T-663/19

93. In Mr Wasu's written submissions, he states:

"16. It is important to note that UK00002182923 was revoked due to a lack of availability of sufficient evidence of use in the specific period of time to which the revocation application related. During the proceedings, there were circumstances relating to the historic operation and record keeping of the business that hindered locating relevant evidence. It was not however the case that the mark was not being used or that Party A had no intention to use it.

94. I note that, whilst this is stated during written submissions, I have no evidence from Mr Wasu regarding any such difficulties in gathering evidence. I agree with Mr Johnson that if Mr Wasu had recommenced use of the diamond logo that applying to re-register it would not amount to bad faith. However, I have seen very little evidence that any such increase in use has been made. I note that Mr Johnson referred to the continued use on shop fronts, but for the reasons set out above, I do not consider that that amounts to resumption of use of the mark.

95. Mr Johnson also referred to the use of marketing materials. I note that a marketing email dated 4 June 2018 (the recipients are not visible) contains one of the marks within the series of marks in issue. However, that document is dated after the relevant date. Whilst I note that there are other marketing materials which Mr Meyeri states were circulated in 2018 and 2019, I have explained above that there are issues with the dating of those documents. Even if they were dated 2018/2019, those in 2019 would clearly have been after the relevant date and without any specific information about when the 2018 documents were circulated I cannot determine whether they were issued before or after the relevant date.³⁰ On balance, I do not consider the evidence before me suggests any move by Mr Wasu to return to use of the diamond logo device; rather, it is simply legacy use left over from the time prior to the re-branding in 2011/2012.

96. Consequently, I do not consider the evidence filed by Mr Wasu sufficient to rebut the presumption that has arisen.

³⁰ Exhibits SMB10 and SMB11

97. The application for invalidation based upon section 3(6) of the Act succeeds in its entirety.

THE OPPOSITION

Section 5(1)

98. The opposition based upon section 5(1) originally relied upon the 679 Mark and the 923 Mark. As noted above, the 923 Mark has since been revoked with effect from 2016 and, consequently, can no longer be relied upon. That leaves only the 679 Mark. However, given my findings in relation to the invalidation as set out above, Mr Wasu will no longer be able to rely upon the 679 Mark.

99. The opposition based upon section 5(1) is dismissed in its entirety.

Section 5(2)(b)

100. The opposition based upon section 5(2)(b) of the Act was originally based upon the 267 Mark, the 544 Mark, the 551 Mark and the 345 Mark. As a result of my findings above, Mr Wasu can no longer rely upon the 267 or 345 Marks. That leaves only the 544 and 551 Marks.

101. The relevant section of the Act states 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 associated with the earlier trade mark.”

102. Section 5A of the Act reads 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.”

103. By virtue of their earlier filing dates, the 544 and 551 Marks qualify as earlier trade marks pursuant to section 6 of the Act. The 551 and 544 Marks are not subject to a request for proof of use and, consequently, Mr Wasu can rely upon all of the goods and services identified.

104. The following principles are relevant which can be gleaned from the decisions of the EU court 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, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a 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 to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

105. I have listed only those goods and services that I consider represent Mr Wasu's best case in the table below (the full specifications can be found in the Annex to this decision). With that in mind, the competing goods and services are as follows:

Mr Wasu's goods/services (the opponent)	Mr Hussain's goods/services (the applicant)
<p>The 551 and 554 Marks</p> <p><u>Class 30</u> Pizzas; preparations made from cereals; pasta; bread; sandwiches; pies; cakes; puddings; sauces (condiments).</p> <p><u>Class 39</u> Transport and delivery of goods; transport and delivery of food and drink.</p> <p><u>Class 43</u> Catering services for the provision of food and drink; restaurant services; bar services; take-away food services; preparation of food and drink.</p>	<p>The 720 Mark</p> <p><u>Class 30</u> Preparations made from cereals; Bread; Cakes; Pizza; Preparations made from cereals; Puddings; Sandwiches; Sauces; Pasta; Pies.</p> <p><u>Class 39</u> Transport and delivery of food and drink; Transport and delivery of goods.</p> <p><u>Class 43</u> Bar services; Catering for the provision of food and drink; Take away food services; Restaurant services; Preparation of food and drink.</p>

106. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court ("GC") stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut for 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.”

Class 30

107. The term “pizza” in the specification of the 720 Mark is self-evidently identical to the term “pizzas” in the specifications of the 544 and 551 Marks.

108. The terms “preparations made from cereals”, “sandwiches”, “pasta”, “pies” “bread”, “puddings” and “cakes” appear identically in the specifications of all three marks.

109. The term “sauces” in the specification of the 720 Mark is identical on the principle outlined in *Merit* to the term “sauces (condiments)” in the specifications of the 544 and 551 Marks.

Class 39

110. The terms “transport and delivery of food and drink” and “transport and delivery of goods” appear identically in the specifications of all three marks.

Class 43

111. The term “take away food services” in the specification of the 720 Mark is self-evidently identical to “take-away food services” in the specifications of the 544 and 551 Marks.

112. The terms “bar services”, “catering for the provision of food and drink” “restaurant services” and “preparation of food and drink” appear identically in the specifications of all three marks.

The average consumer and the nature of the purchasing act

113. As the case law above indicates, it is necessary for me to determine who the average consumer is for the parties' respective goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. 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.”

114. The average consumer for the goods and services is likely to be a member of the general public. The goods are likely to be reasonably frequent purchases and are unlikely to be particularly expensive. Various factors are likely to be taken into account such as nutritional content, ingredients and dietary requirements. The services are likely to vary in frequency of purchase depending upon the nature of the establishment but, on average, are unlikely to be particularly expensive. Various factors will be taken into consideration such as type of food offered, speed of service and cleanliness. Taking all of this into account, I consider that between a low and medium degree of attention is likely to be paid in respect of the goods and a medium degree for the services.

115. The goods are likely to be purchased by self-selection from the shelves of a retail outlet or online equivalent. The services are likely to be purchased following perusal of signage on premises' frontage, advertisements or websites. Consequently, I consider the purchasing process to be predominantly visual. However, I do not discount an aural component to the purchase given that orders may be placed by

telephone or in person (for, example, at a restaurant) and word-of-mouth recommendations may be made.


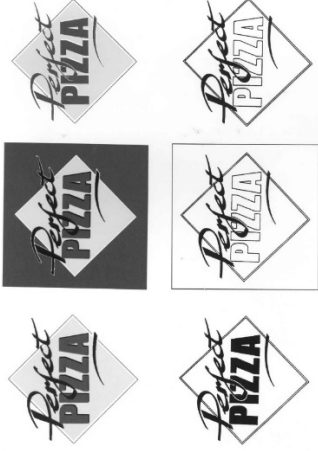
Comparison of trade marks

116. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. 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.”

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

118. The respective trade marks are shown below:

Mr Wasu's Marks (the opponent)	Mr Hussain's Mark (the applicant)
 <p data-bbox="408 1171 580 1205">(series of 3)</p> <p data-bbox="389 1225 600 1258">(the 544 Mark)</p> <p data-bbox="245 1335 743 1368">THE PERFECT PIZZA COMPANY</p> <p data-bbox="389 1388 600 1422">(the 551 Mark)</p>	 <p data-bbox="991 779 1201 813">(the 720 Mark)</p>

119. There was some suggestion at the hearing that the intention had been to register the 720 Mark as a series of marks. However, that was not done and no attempt has been made to rectify the position. Consequently, I must treat it as it appears on the register for the purposes of my comparison.

Overall Impression

120. The word PERFECT is laudatory and the word PIZZA is descriptive of at least some of the goods and services. The addition of the words THE and COMPANY are non-distinctive. I consider that the overall impression of the 551 Mark lies in the words THE PERFECT PIZZA COMPANY as a whole.

121. The same applies to the 544 Mark. It is the words in combination which play the greater role in the overall impression of the mark, with the stylisation and device playing a lesser role.

122. The 720 Mark consists of the words PERFECT PIZZA presented in slightly stylised fonts repeatedly on six diamond shaped backgrounds (some of which themselves appear on square backgrounds). I recognise that the eye is naturally drawn to elements of a mark that can be read. However, the words PERFECT PIZZA are descriptive. Consequently, I consider that the wording and the repetition, orientation and stylisation will play a roughly equal role in the overall impression.

Visual Comparison

The 720 Mark and the 551 Mark

123. Visually, the marks overlap in that they all contain the words PERFECT PIZZA. The visual differences are created by the repetition and orientation in the 720 Mark and the use of backgrounds. The stylisation of the words is likely to be covered by notional and fair use of a word only mark (as is the case for the 551 Mark). The presence of the words THE and COMPANY in the 551 Mark which are absent from the 720 Mark will also contribute to the visual differences between the marks. Taking all of this into account, I consider the marks to be visually similar to between a low and medium degree.

The 720 Mark and the 544 Mark

124. The same comparison applies as set out above. However, there are additional differences created by the different stylisation/background used in the 544 Mark. Consequently, the marks are visually similar to a low degree.

Aural Comparison

The 720 Mark and the 551 Mark

125. Aurally, the words PERFECT PIZZA in the 551 Mark will be given their ordinary English pronunciation. Although these words appear six times in the 720 Mark, I consider it unlikely that this will actually be articulated by the average consumer. Rather, they are just likely to refer to the 720 Mark as “Perfect Pizza”. This will overlap with the presence of the words PERFECT PIZZA in the 551 Mark. However, the addition of the words THE and COMPANY will mean that the marks are aurally similar to a medium degree (if the words PERFECT PIZZA are only pronounced once in the 720 Mark) or similar to a low degree (if they are repeated).

The 720 Mark and the 544 Mark

126. The stylisation/device in the 544 Mark will not be articulated. Consequently, the same comparison applies as set out above.

Conceptual Comparison

The 720 Mark and the 551 Mark

127. Conceptually, the marks overlap to the extent that they both refer to a pizza which is perfect. However, the 551 Mark conveys the message of a business that produces or sells the perfect pizza, whereas the 720 Mark conveys the message referring to the goods themselves. Taking this into account, I consider the marks to be conceptually similar to a medium degree.

The 720 Mark and the 544 Mark

128. The stylisation/device in the 544 Mark will not convey any particular meaning. Consequently, the same comparison applies as set out above.

Distinctive character of the earlier trade mark

129. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-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).”

130. 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 and services, to those with high inherent distinctive character, such as

invented words with no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

131. Clearly, Mr Wasu has been using the 551 and 544 Marks since the re-brand in 2011/2012. The marks have been used across a number of stores, on signage and on promotional materials. However, the level of advertising and promotional activity shown appears to me to be relatively low scale. I am satisfied that use of the marks was reasonably geographically widespread. Mr Wasu gives evidence that sales through the website have amounted to over £25million over a period of over 20 years. The evidence shows that since the re-brand, the website has displayed the 544 Mark. Whilst these sales figures are clearly not insignificant, they do not represent a particularly significant market share in what must undoubtedly be an extensive market in the UK. Taking all of this into account, I am not satisfied that the evidence is sufficient to demonstrate that the 544 and 551 Marks had acquired enhanced distinctiveness through use.

132. I have, therefore, only the inherent position to consider. As noted above, the words THE PERFECT PIZZA COMPANY refer to a business that produces the 'perfect pizza'. In my view, any distinctiveness of the mark must lie in the combination of these words. Consequently, I consider the 551 mark to be inherently distinctive to either a low or between low and medium degree, depending upon the goods/services on which it is used. I do not consider that the stylisation/device in the 544 Mark increases the distinctiveness of the mark materially and so the same finding will apply.

Likelihood of confusion

133. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be

offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the 544 and 551 Marks, the average consumer for the goods and 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.

134. I have made the following findings:

- a. The 551 Mark and the 720 Mark are visually similar to between a low and medium degree. They are aurally similar to a medium degree or to a low degree, depending upon how the 720 Mark is pronounced. They are conceptually similar to a medium degree.
- b. The 544 Mark and the 720 Mark are visually similar to a low degree. They are aurally similar to a medium degree or to a low degree, depending upon how the 720 Mark is pronounced. They are conceptually similar to a medium degree.
- c. The average consumer is a member of the general public who will pay between a low and medium degree of attention to the purchase of the goods or a medium degree to the purchase of the services.
- d. The purchasing process will be predominantly visual, although I do not discount an aural component.
- e. The earlier marks are both inherently distinctive to either a low or between low and medium degree, depending upon the goods and services on which they are used.
- f. The goods and services vary from being identical to similar to a medium degree.

135. In my view, the visual and aural differences between the marks will be sufficient to prevent them from being mistakenly recalled or misremembered as each other. I

recognise that the marks all contain the common words PERFECT PIZZA, however, given the low distinctiveness of these words, I consider it unlikely that the other elements (such as the words THE and COMPANY, and the presentational differences) will be overlooked.

136. In terms of indirect confusion, I bear in mind that a finding of indirect confusion should not be made merely because two marks share a common element; it is not enough that one mark merely calls to mind another. This is mere association, not indirect confusion.³¹ The only common element of the marks is the words PERFECT PIZZA, which for the reasons set out above are descriptive and low in distinctiveness for the goods/services. The addition of the words THE and COMPANY in the earlier marks create a clear point of conceptual difference. Consequently, I consider it unlikely that the average consumer would view these marks as originating from the same or economically linked undertakings. In my view, it is far more likely that the average consumer will consider the common use of the descriptive/laudatory words PERFECT PIZZA as a coincidence. Consequently, I do not consider there to be a likelihood of indirect confusion.

137. The opposition based upon section 5(2)(b) is dismissed.

Section 5(3)

138. 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 (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be

³¹ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

detrimental to, the distinctive character or repute of the earlier trade mark.”

139. The opposition under section 5(3) of the Act relies upon the 267 and 544 Marks. In light of my revocation findings above, the opposition on this ground can proceed on the basis of the 544 Mark only.

140. I bear in mind the relevant case law set out in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the earlier mark is similar to the applicant’s mark. Secondly, the opponent must show that the earlier mark has achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the later mark. Fourthly, assuming that the first three conditions are met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods and services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

141. The relevant date for the purposes of my assessment is the date of the application i.e. 10 June 2019.

142. For the same reasons given above in relation to enhanced distinctiveness, I do not consider the evidence sufficient to demonstrate the requisite reputation. The evidence does not support a particularly significant market share and the advertising and promotional activities shown are relatively low scale. Taking all of this into account, I am not satisfied that Mr Wasu has established the requisite reputation.

143. The opposition based upon section 5(3) is dismissed.

Sections 5(4)(a)

144. I have set out the law in relation to section 5(4)(a) above. Whilst I do not propose to repeat it here, I have taken it into consideration in reaching my decision.

145. Under section 5(4)(a), Mr Wasu relies upon the following signs:



PERFECT PIZZA



146. I do not consider that THE PERFECT PIZZA COMPANY sign will put Mr Wasu in any stronger position than he is under section 5(2)(b). The same differences will apply with the effect that there will be no misrepresentation or damage for the same reasons as set out above. Given the similarity in stylisation/presentation of the 720 Mark and the PERFECT PIZZA diamond logo sign relied upon, I will begin by assessing this ground on the basis of that sign, returning to the word only mark if it is necessary to do so.

147. The prima facie relevant date is the date of the application for the 720 Mark i.e. 10 June 2019. However, I note that Mr Hussain has made reference to his use of the 720 Mark prior to the application for registration. I have already set out above that Mr Hussain's use from 2003 onwards would have related to use under the franchise

agreement, which was use with the consent of Mr Wasu or his predecessors in title. I have seen no evidence of use of the mark prior to that date. Any use made after the termination of the franchise agreement was use that could have been prevented by Mr Wasu as a breach of the agreement. As a result, Mr Hussain is not able to rely upon this use for establishing an earlier relevant date and I need only consider the position at the prima facie relevant date.

Goodwill

148. I have summarised Mr Wasu's evidence of use from 2011 onwards above. I also note the following:

- a. Mr Wasu gives evidence that the website for the business has been in operation for "20+ years" and has generated sales during that time of over £25,000,000;
- b. The franchise agreement which is dated 13 February 2003, relates to the use of the sign PERFECT PIZZA;
- c. Mr Wasu gives evidence that the sign has been used at various stores across the UK including Chiswick, Guildford, Leamore, Portsmouth and Southsea, Rowley Regis and Stevenage.
- d. Mr Hussain accepts that his use of the 923 Mark (which is now cancelled) was covered by the franchise agreement;³²
- e. There does not seem to be any real dispute as to chain of title. In this regard, in his witness statements, Mr Hussain states:

"We have been one of the Franchisee of Perfect Pizza, since 13th February 2003. The Company, Aspire Cuisine Limited by Perfect Pizza Limited entered into franchise Agreement with Zaheer Hussain as the franchisee. [...]"

³² Exhibit JWA4

And:

“On 02-07-2011, Mr Wasu incorporated a company namely Aspire Cuisine Ltd. (Mr Wasu was the director), after that, Aspire Cuisine Ltd. Bought the business Perfect Pizza Ltd. On Same day dated 01 Aug 2011, he changed the company name to “The Perfect Pizza Company Ltd” and for this new venture; he also changes the trading name [....]

Following, on 30-01 2015, bad administration of his company. Mr Wasu willingly declared that he is incompetent to continue (Franchise) The Perfect Pizza Business. So he voluntarily handed over the company to the administrator; consequently, upon the appointment of the administrators Mr Wasu bought all Intellectual Property Rights along with Revoked Mark UK2182923 for a nominal under value of one pound (£1). [...]

149. It seems to me that Mr Hussain accepts that intellectual property rights (which would include the goodwill in the business) were transferred from The Perfect Pizza Company Ltd to Mr Wasu in 2015.

150. There does not seem to be any real dispute between the parties that Mr Wasu's business had goodwill at the relevant date. It is the business itself which generates goodwill, not a particular sign. Consequently, the fact that there was a rebrand in 2011/2012 does not impact upon the question of whether the business has goodwill. The real dispute appears to relate to whether the signs relied upon were distinctive of that goodwill at the relevant date. In any event, for the avoidance of doubt, I am satisfied that Mr Wasu had a reasonable (and protectable) degree of goodwill at the relevant date in relation to pizza take away services and pizzas. The website had been operating for over 20 years and had generated £25million in sales during that time. Whilst this does not amount to a particularly extensive sum per annum in the context of the market and I have no information about the distribution of these sales over the 20 year period, it represents a reasonable turnover over. There is clearly evidence of Mr Wasu's business trading from various premises prior to the relevant date. Further,

any goodwill generated by Mr Hussain's business under the franchise agreement would have accrued to Mr Wasu (or his predecessors in title). As noted above, it does not seem to me that there is any real dispute that Mr Wasu owned any such goodwill, as the chain of title has not been disputed.

151. The real question (and the point of dispute between the parties) is whether the signs relied upon were distinctive of Mr Wasu's goodwill at the relevant date. Mr Wasu claims to have started using the PERFECT PIZZA logo as early as 1998. This does not appear to be disputed by Mr Hussain. Indeed, Mr Hussain accepts that his own business has been using the diamond logo device since 2003. As I have set out above, there was clearly a re-brand in 2011/2012 to THE PERFECT PIZZA COMPANY and any continued use by Mr Wasu after that time was on a very small scale. Certainly, up until the re-brand, it seems to me that the PERFECT PIZZA diamond logo was distinctive of Mr Wasu's goodwill. Although the evidence is limited, there are examples of use on the website prior to that date and on advertising materials. I note that there was a period of 7 years between the re-brand and the relevant date. However, there was some continued use of the sign on the Fordhouses store (albeit not enough to establish genuine use) and the inclusion of the words PERFECT PIZZA in the new logo (THE PERFECT PIZZA COMPANY) is likely to have kept the connection alive in the minds of the consumer. That is not to say that use of the new logo would be acceptable use of the old logo or that they are close enough to result in a likelihood of confusion; I have already found that not to be the case above. However, it is clear that Mr Wasu was attempting to educate customers that a rebrand was taking place and that the same business was continuing to operate under a new mark. This, combined with the continued use of the words PERFECT PIZZA (albeit as part of a different mark) would have assisted in keeping the PERFECT PIZZA logo in the mind of customers. Taking this into account, as well as the longevity of the business and use of the sign prior to that re-brand, I am satisfied that it is likely that the PERFECT PIZZA diamond logo remained distinctive of Mr Wasu's goodwill at the relevant date.

Misrepresentation and damage

152. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

“There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]”

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

And later in the same judgment:

“.... for my part, I think that references, in this context, to “more than *de minimis*” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993). It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

153. *Halsbury's Laws of England* Vol. 97A (2012 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 309, it is noted (with footnotes omitted) that:

“To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

154. As noted above, the 720 Mark consists of six diamond devices with the words PERFECT PIZZA across each. The sign relied upon is identical to one of these devices. Clearly, some distinction can be drawn by the fact that the 720 Mark contains repetition which is absent from the sign relied upon. Taking all of this into account, I consider the marks to be highly similar.

155. The parties are both operating within the same fields of activity. It would not be uncommon for businesses that sell foods such as pizzas to also sell other pre-prepared goods such as cakes and pastas. Consequently, I consider the class 30 goods to be within the same field of activity as the goods and services for which Mr Wasu has established goodwill. It would also not be uncommon for the services in classes 39 and 43 of the application to fall within the same field of activity. Clearly, food businesses may provide bar services and takeaway services, as well as home delivery. Consequently, I consider that there is significant overlap.

156. In my view, given the overlap in terms of fields of activity and the similarity between the mark and the sign relied upon, I consider it likely that there will be a misrepresentation. Whilst I accept that the wording in both marks is non-distinctive for the goods/services, the stylisation/presentation of those words is identical (with the exception of the repetition in the 720 Mark). As a result, I consider that a substantial number of members of the relevant public would be deceived by use of the 720 Mark in relation to the goods and services which share some overlap in fields of activity with Mr Wasu's activities. Given the overlap in fields of activity, damage through diversion of sales is easily foreseeable.

157. The opposition based upon section 5(4)(a) succeeds in its entirety.

Section 3(6)

158. I have set out the law in relation to section 3(6) above. Whilst I do not propose to repeat it here, I have taken it into consideration in reaching my decision.

159. In relation to the section 3(6) ground, Mr Wasu states:

“The Applicant was, by his own admission (see Cancellation No. CA000501937), a franchisee of the Opponent’s predecessors in title and should have stopped use of the opposed mark once the franchisee agreement terminated but failed to do so. He is aware of the Opponent’s earlier rights as he sought to revoke a registration of the Opponent for a mark identical to that which UK3405720 relates (see Cancellation No. CA000501937).

Due to the evidence and submissions filed in relation to Cancellation No. CA000501937 the Applicant, Zamir Hussain, is aware of the Opponent’s continuing interest in the mark and is aware that the Opponent is using the mark on store frontage. This is beyond refute as it is detailed in Zamir Hussain’s own witness statement of 3 October 2018 (copy attached). [...]

The Applicant, Zamir Hussain, is also fully aware that he has no right to use or seek to register the mark as his witness statement refers to exhibit ZH1 which is a Franchise Agreement [...] in which it is clearly noted at 14.4 (page 26) that no application to register a trade mark shall be made.”

160. As noted above, I am satisfied that Mr Hussain was bound by the franchise agreement. I am also satisfied that Mr Wasu had rights in the PERFECT PIZZA diamond logo at the relevant date. Mr Hussain accepts that the diamond logo was covered by the terms of the franchise agreement. The franchise agreement confirms that, if terminated, the franchisee must cease use of the marks that were the subject of that agreement.

161. It seems to me that continued use of a trade mark covered by a franchise agreement under which Mr Hussain was operating and by which he considered himself bound, followed by a subsequent application to register a highly similar trade mark (albeit one that repeats the same/similar device six times) after he claims that agreement had come to an end, creates a prima facie case of bad faith.

162. In his Form TM8, Mr Hussain refers to his own allegations of bad faith against Mr Wasu. However, this cannot amount to a defence under this ground of opposition.

163. Mr Hussain also states:

“In Regards Franchise Agreement and using the applied Trade Mark No. UK00003405720 it is totally contractual matter, therefore it not the forum to discussion. Following, as usual to bad administration of the company director “The Perfect Pizza Company Ltd”. Mr Wasu willingly declared that he is incompetent to run the Business (Franchise Company), as a result Mr Wasu voluntarily handed over the company to the administrator.

Above and beyond, it is also should be resolve in the civil court because the civil court has jurisdiction or authority to deal with that sort of issues or cases, even though, (Mr Wasu) sent me Legal Notice as well, and I already reply back accordingly for this notice, anyhow I applied as per UK IPO law after the cancellation of the earlier mark, (see cancellation No. CA000501937)

Therefore, applicant made an application for registration of mark UK0000305720 lawfully in good faith.”

164. For the avoidance of doubt, it is not uncommon for this Tribunal to have to deal with contractual disputes as part of deciding grounds of opposition/invalidation. Consequently, I see no merit in the arguments regarding jurisdiction raised by Mr Hussain. I recognise that the timing of the application in dispute was after the decision given by the previous hearing officer in relation to the previous revocation proceedings between the parties. However, Mr Hussain has provided no explanation as to why he applied to register a trade mark with the identical stylisation/presentation as that which he knew he had been permitted to use only by virtue of the franchise agreement and had been required to cease using once that agreement came to an end. I recognise that there does not appear to have been any action on Mr Wasu’s part to prevent Mr Hussain from using the logo during the intervening period following the end of the franchise agreement, but I do not consider that sufficient to overcome the prima facie case as discussed above.

165. It seems to me, in the absence of any plausible explanation provided by Mr Hussain, that he sought to benefit from any local awareness/familiarity with that sign that had resulted from his trading under the franchise agreement. Mr Hussain, himself, may have considered this to be acceptable conduct given that Mr Wasu had re-

branded his business. However, I must judge the position by the standard of honest commercial practices. The very fact that Mr Hussain chose a highly similar mark (using the identical presentation of the words PERFECT PIZZA) to that used by Mr Wasu, suggests to me that he believed (rightly or wrongly) that there was some benefit to be gained from continuing to use this mark. However, as he had been using the mark only by virtue of the franchise agreement, he was not entitled to continue using it. On balance, I am not satisfied that the explanations given by Mr Hussain are sufficient to rebut the prima facie bad faith case established by Mr Wasu.

166. The opposition based upon section 3(6) succeeds in its entirety.

CONCLUSION

167. The opposition against UK application no. 3405720 succeeds in its entirety and the application is refused.

168. The application for a declaration of invalidation against UK registration no. 3306679 succeeds in its entirety. Under section 47(6) of the Act, the registration is deemed never to have been made.

169. The application for revocation against UK registration no. 3013345 succeeds in its entirety. The effective date of revocation is 2 April 2017.

170. The application for revocation against UK registration no. 2190267 succeeds in its entirety. The effective date of revocation is 2 April 2017.

COSTS

171. At the hearing, Mr Johnson submitted that costs should be awarded in his client's favour at the higher end of the scale. However, it is Mr Hussain who has enjoyed the great degree of success and so I need consider this request no further. Mr Wasu succeeded in the opposition and Mr Hussain succeeded in the invalidation. The costs of these actions will cancel each other out. However, Mr Hussain has also succeeded in relation to both revocation cases. As a result, I consider it appropriate to make an

award of costs in relation to the revocations only. I bear in mind that there was significant overlap in terms of evidence filed in relation to both cases.

172. Mr Hussain is unrepresented and has submitted a costs proforma claiming the following:

8 hours for preparing the Notices of Cancellation (in relation to the revocations and invalidation)

200 hours for preparing evidence and filing written submissions in relation to all of the consolidated cases

20 hours for preparing for and attending the hearing.

173. I note that, although a significant amount of time has been claimed by Mr Hussain in relation to the preparing and filing of evidence, this relates to all 4 of the consolidated cases. In relation to the revocations, the evidential burden was on Mr Wasu (not Mr Hussain).

174. I consider a costs award for the following number of hours to be reasonable:

- Completing the Notice of Cancellation (x2) - 4 hours
- Considering the other side's evidence and preparing evidence – 20 hours
- Preparing for and attending hearing – 10 hours

Total: 34 hours

175. Mr Hussain is also entitled to recover his official fees in relation to the revocations which would amount to £400 (£200 x 2).

176. Mr Hussain has also requested £100 in relation to "copys". However, no information is provided about what this relates to. Consequently, I decline to make an award in respect of it.

177. In relation to the hours expended, I note that The Litigants in Person (Costs and Expenses) Act 1975 (as amended) sets the minimum level of compensation for litigants in person in Court proceedings at £19.00 an hour. I see no reason to award anything other than this. I therefore award Mr Hussain the sum of £646 (34 hours at £19 per hour) plus £400 in official fees. This amounts to **£1,046.00**.

178. I therefore order Mr Wasu to pay Mr Hussain the sum of **£1,046**. 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 9th day of December 2021

S WILSON

For the Registrar

ANNEX

UK no. 3306679 (series of 3) (“the 679 Mark”)

Class 30 Pizzas; pizza bases; chilled pizzas; frozen pizzas; pizza dough; pizza flour; pizza mixes; pizza products namely pizza slices; pizza sauces; pizza toppings namely sauces, spices and culinary herbs; uncooked pizzas; preparations made from cereals; preparations made from flour; pasta; pasta based dishes; rice; rice based dishes; bread; garlic bread; sandwiches; pies; pastry; cakes; puddings; desserts; confectionery; ices; ice cream; sauces (condiments); dipping sauces; spices; coffee; tea; cocoa; food stuffs in the form of prepared meals, snack foods or snacks; prepared meals; prepared cooked meals; prepared meals in the form of pizzas; pizza meals.

Class 39 Transport; packaging and storage of goods; transport and delivery of goods; transport and delivery of food and drink; pizza delivery services; information and advice in relation to the aforesaid.

Class 43 Services for providing food and drink; catering services for the provision of food and drink; restaurant services; pizza restaurant services; cafe services; bar services; takeaway services; take-away food services; preparation of food and drink; restaurant, cafe or takeaway services located in a food court; information and advice in relation to the aforesaid.

UK no. 2182923 (“the 923 Mark”)

Class 30 Pizzas; bread; pasta; preparations made from cereals, bread, pastry, pasta; cakes and confectionery; puddings; sandwiches; sauces; pies.

Class 39 Transport and delivery of goods; transport and delivery of food and drink.

Class 43 Catering services for the provision of food and drink; restaurant services; bar services; take-away food services; preparation of food and drink.

UK no. 2190267 (“the 267 Mark”)

Class 30 Pizzas; bread; pasta; preparations made from cereals, bread, pastry, pasta; cakes and confectionery; puddings; sandwiches; sauces; pies.

Class 39 Transport and delivery of goods; transport and delivery of food and drink.

Class 42 Catering services for the provision of food and drink; restaurant services; bar services; take-away food services; preparation of food and drink.

UK no. 2605544 (series of 3) (“the 544 Mark”)

Class 29 Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; prepared or cooked dishes based on vegetables, meat, fish, poultry or game; cooked meats; cooked poultry; cooked vegetables; cheeses; cheese products; mozzarella sticks; cheese bites; processed mushrooms; garlic mushrooms; processed onions; onion rings; processed potatoes; cooked potato products; chips; French fries; potato wedges; potato based snack foods; vegetable based snack foods; salads; prepared salads; fruit salads; coleslaw; chicken fillets; chicken wings; pizza toppings.

Class 30 Pizzas; pizza bases; chilled pizzas; frozen pizzas; pizza dough; pizza flour; pizza mixes; pizza products; pizza sauces; pizza toppings; uncooked pizzas; preparations made from cereals; preparations made from flour; pasta; pasta based dishes; rice; rice based dishes; bread; garlic bread; sandwiches; pies; pastry; cakes; puddings; desserts; confectionery; ices; ice cream; sauces (condiments); dipping sauces; spices; coffee; tea; cocoa; food stuffs in the form of prepared meals,

snack foods or snacks; prepared meals; prepared cooked meals; prepared meals in the form of pizzas; pizza meals.

- Class 31 Fresh fruits and vegetables; prepared fruit dishes; prepared vegetable dishes.
- Class 32 Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.
- Class 39 Transport; packaging and storage of goods; transport and delivery of goods; transport and delivery of food and drink; pizza delivery services; information and advice in relation to the aforesaid.
- Class 43 Services for providing food and drink; catering services for the provision of food and drink; restaurant services; pizza restaurant services; cafe services; bar services; takeaway services; take-away food services; preparation of food and drink; restaurant, cafe or takeaway services located in a food court; information and advice in relation to the aforesaid.

UK no. 2605551 (“the 551 Mark”)

- Class 29 Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; prepared or cooked dishes based on vegetables, meat, fish, poultry or game; cooked meats; cooked poultry; cooked vegetables; cheeses; cheese products; mozzarella sticks; cheese bites; processed mushrooms; garlic mushrooms; processed onions; onion rings; processed potatoes; cooked potato products; chips; French fries; potato wedges; potato based snack foods; vegetable based snack foods; salads; prepared salads; fruit salads; coleslaw; chicken fillets; chicken wings; pizza toppings.

- Class 30 Pizzas; pizza bases; chilled pizzas; frozen pizzas; pizza dough; pizza flour; pizza mixes; pizza products; pizza sauces; pizza toppings; uncooked pizzas; preparations made from cereals; preparations made from flour; pasta; pasta based dishes; rice; rice based dishes; bread; garlic bread; sandwiches; pies; pastry; cakes; puddings; desserts; confectionery; ices; ice cream; sauces (condiments); dipping sauces; spices; coffee; tea; cocoa; food stuffs in the form of prepared meals, snack foods or snacks; prepared meals; prepared cooked meals; prepared meals in the form of pizzas; pizza meals.
- Class 31 Fresh fruits and vegetables; prepared fruit dishes; prepared vegetable dishes.
- Class 32 Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.
- Class 39 Transport; packaging and storage of goods; transport and delivery of goods; transport and delivery of food and drink; pizza delivery services; information and advice in relation to the aforesaid.
- Class 43 Services for providing food and drink; catering services for the provision of food and drink; restaurant services; pizza restaurant services; cafe services; bar services; takeaway services; take-away food services; preparation of food and drink; restaurant, cafe or takeaway services located in a food court; information and advice in relation to the aforesaid.

UK no. 3013345 (“the 345 Mark”)

- Class 29 Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; prepared or cooked dishes based on vegetables, meat, fish, poultry or game; cooked meats; cooked poultry;

cooked vegetables; cheeses; cheese products; mozzarella sticks; cheese bites; processed mushrooms; garlic mushrooms; processed onions; onion rings; processed potatoes; cooked potato products; chips; French fries; potato wedges; potato based snack foods; vegetable based snack foods; salads; prepared salads; fruit salads; coleslaw; chicken fillets; chicken wings; pizza toppings.

Class 30 Pizzas; pizza bases; chilled pizzas; frozen pizzas; pizza dough; pizza flour; pizza mixes; pizza products; pizza sauces; pizza toppings; uncooked pizzas; preparations made from cereals; preparations made from flour; pasta; pasta based dishes; rice; rice based dishes; bread; garlic bread; sandwiches; pies; pastry; cakes; puddings; desserts; confectionery; ices; ice cream; sauces (condiments); dipping sauces; spices; coffee; tea; cocoa; food stuffs in the form of prepared meals, snack foods or snacks; prepared meals; prepared cooked meals; prepared meals in the form of pizzas; pizza meals.

Class 31 Fresh fruits and vegetables; prepared fruit dishes; prepared vegetable dishes.

Class 32 Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.