

O/715/22

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3582352
IN THE NAME OF BERTRAM NURSERY GROUP LIMITED
FOR A SERIES OF TWO TRADE MARKS**



Thrive Childcare
and Education

IN CLASS 43

AND

**THE OPPOSITION THERETO UNDER NUMBER 425054
BY FRONTING THE CHALLENGE PROJECTS LIMITED**

Background and pleadings

1. On 20 January 2021, Bertram Nursery Group Limited (“the applicant”) filed an application for the series of two trade marks shown on the cover page of this decision (number 3582352) in Class 43 for *Nurseries; day-nurseries; day care centres for children; child care centres; out of school care centres; crèches; crèche services; provision of day care services for infants, pre-school children and school age children; provision of day nursery services; provision of before-school care; provision of after-school care; out of school clubs for children; child minding services; provision of breakfast clubs for children; preparation and provision of meals for children; all being nursery services for pre-school age children, and none being educational services.*¹

2. The application was published on 12 March 2021 and opposed by Fronting the Challenge Projects Limited (“the opponent”) under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon a single earlier trade mark registration for both grounds, as follows:

3122374

THRIVE

Filing date: 14 August 2015; date of entry in register: 11 March 2016

3. The opponent relies upon all of its Class 41 services for the section 5(2)(b) ground: *Education services; training services; educational courses; educational services; consultancy and advisory services relating to education; arrangement of conferences for educational purposes; dissemination of educational materials; excluding services used in connection with dental and veterinary sectors.* It claims that the parties’ services are highly similar and the marks are visually, aurally and conceptually highly similar, leading to a likelihood of confusion.

¹ The application originally included services in class 41, which the applicant deleted by way of a Form TM21B, also amending its class 43 services.

4. The opponent claims a reputation in its mark for *Education services; training services* under section 5(3) of the Act, such that the relevant public will believe the applicant's mark belongs to the opponent or an undertaking linked to the opponent. The opponent also claims that use of the applicant's mark will erode the distinctiveness of the earlier mark, damage its repute if used in relation to services of poor quality, and give an unfair advantage to the applicant by virtue of the reputation of the earlier mark.

5. The applicant filed a defence and counterstatement, denying the grounds of opposition.

6. The opponent is professionally represented by Foot Anstey LLP and the applicant by Sonder IP Limited. Both parties filed evidence and the opponent filed written submissions with its evidence-in-chief. Neither party requested a hearing, but the applicant filed written submissions in lieu of a hearing. I make this decision after a careful reading of all the papers, referring to them as necessary.

Evidence

7. The opponent has filed evidence from two witnesses. The first witness statement is from Fay Steer, who is the Head of Marketing for the opponent.² Ms Steer gives evidence about the opponent's business. Charlene Nelson is an attorney with the opponent's firm of professional representatives, providing a second witness statement in response to the applicant's evidence.³ The applicant's evidence comes from Rachel Nicholls, an attorney with the applicant's firm of professional representatives. Ms Nicholls gives evidence about the definitions of THRIVE and third party use of THRIVE.⁴

² Witness statement dated 25 January 2022, with exhibits.

³ Witness statement dated 24 May 2022.

⁴ Witness statement dated 25 March 2022, with exhibits.

Request for suspension of proceedings

8. On 1 July 2022, after the evidence rounds in the present proceedings had closed, the applicant filed three cancellation applications against the opponent's earlier trade mark registration. These actions are based on the following grounds of the Act:

- section 47(1)/3(1)(b) and (c): that the mark is (and was at the date on which it was filed) devoid of any distinctive character and is descriptive of the services for which it is registered;
- sections 46(1)(c) and (d): that through the actions or inaction of the opponent, the earlier mark has become commonly used in the trade, and has become misleading;
- sections 46(1)(a) and (b): that the mark was not put to genuine use in the five years after registration or between 1 July 2017 and 30 June 2016. The claimed effective dates of revocation are either 12 March 2021 or 1 July 2022.

9. On 6 July 2022, the opponent requested suspension of the present proceedings pending the outcome of the applicant's three cancellation applications. The Intellectual Property Office ("IPO") refused the request on 7 July 2022.⁵ The refusal stated that, if need be, the substantive decision (i.e. this decision) would be provisional to the effect that if the opposition were to be successful, it would stand only to the extent that the cancellation actions failed.

10. The applicant filed its written submissions in lieu of a hearing on the same day (7 July 2022). It acknowledged that the cancellation application on the grounds non-use would not have any effect on the opposition. I agree: the non-use cancellation application has no relevance to or bearing on the status of this decision. This is because both of the claimed effective dates for revocation post-date the filing date of the contested application. The opponent's trade mark registration would still have been extant on the register and an earlier trade mark at the date on which the opposed trade mark application was filed ("the relevant date").⁶

⁵ The deadline for the parties to file their written submissions in lieu of a hearing.

⁶ *AR v Cooper International Spirits and Others*, C-622/18 (Court of Justice of the European Union) and *Tax Assist*, Professor Ruth Annand, sitting as the Appointed Person, BL O/220/12.

11. For the same reason, the cancellation application made under section 46(1)(c) and (d) would have no effect on the opposition if the effective date of revocation was the date on which the cancellation application was made (1 July 2022), per section 46(6)(a):

“(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.”

12. However, the applicant requests revocation from at least 19 January 2021, per section 46(6)(b), which is the day prior to the filing date of the opposed application. If this claimed revocation date was successful, it could have an effect on the opposition.

13. The cancellation actions against the opponent’s trade mark registration were filed over a year after the opposition was filed and at the point when the present proceedings were ready for a substantive decision. This is very late in the day. Under section 72 of the Act, the opponent’s earlier trade mark is deemed valid unless or until a decision is made that it is invalid.⁷ However, I bear in mind that the outcome of this opposition hinges upon a single earlier mark which is now subject to attack. The earlier mark may present a barrier to the application becoming registered, a barrier which may ultimately be shown not to exist. Importantly, neither party objected to or commented upon the IPO’s refusal of the suspension request. Nor was any comment made about the IPO’s stated course of action; i.e. the potential for a provisional, not a final, decision.

⁷ “72. In all legal proceedings relating to a registered trade mark (including proceedings for rectification of the register) the registration of a person as proprietor of a trade mark shall be prima facie evidence of the validity of the original registration and of any subsequent assignment or other transmission of it.”

14. If the opposition is unsuccessful, this decision will be final. If I decide that the opposition succeeds in whole or in part, I will suspend the implementation of this decision until the outcome of the relevant cancellation applications are known.

Section 5(2)(b) of the Act

15. Section 5(2)(b) states:

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

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

16. Section 5A states:

“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.”

17. The following principles for determining whether there is a likelihood of confusion under section 5(2)(b) of the Act are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v 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.⁸

The principles

(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

⁸ 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 Trade Marks Act relied on 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.

role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

Distinctive character of the earlier mark

18. 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.⁹

'Thrive' is a verb, the definition of which is:

"To grow or develop well and vigorously; to flourish, prosper."¹⁰

19. The applicant's witness, Ms Nicholls, states that "thrive" has no, or a barely discernible, distinctive character for the opponent's services and supports her statement with extracts from several third-party websites using the word, which I note

⁹ *Sabel BV v Puma AG*, Case C-251/95.

¹⁰ Online *Oxford English Dictionary*, as at 15 August 2022. This accords with the various dictionary definitions given in the applicant's evidence, Exhibit RN1.

include use of THRIVE as the name, rather than a description, of services.¹¹ In any event, it is not open to me to find no distinctive character because, per Section 72 of the Act, the opponent's mark is registered and therefore has at least a minimum degree of inherent distinctive character. The place for the applicant's arguments is in its cancellation application(s).

20. The earlier mark has no more than a low degree of inherent distinctive character for educational services which help children to grow or develop well. I will now look at the opponent's evidence about its earlier mark to see if the use made of it had enhanced its inherent level of distinctive character by the filing date of the contested application.

21. Distinctive character is a measure of how strongly the earlier mark identifies the goods or services for which it is registered, determined, according to *Lloyd Schuhfabrik Meyer & Co.*, partly by assessing the proportion of the relevant public which, because of the mark, identify the goods or services as originating from a particular undertaking. At paragraph 23, of its judgment, the CJEU stated:

“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).

22. Ms Steer states that the opponent provides training and tools for professionals in education, health and social care, and to parents and carers, to support the social and emotional development of children and young people, from early years through to

¹¹ Exhibits RN5 and RN6.

adolescence. Ms Steer states that the opponent has used the earlier mark since 2008. A 2018/2019 flyer for training courses for practitioners in support for babies and very young children shows the following mark:



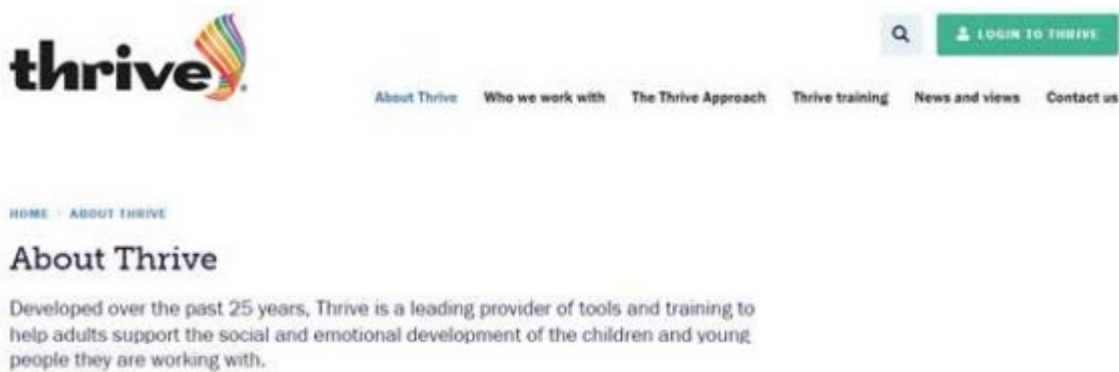
23. This is how the mark appears on the opponent's stationery and business cards, handed to clients and potential clients by the opponent's fifty employees prior to the relevant date. It is also how the mark appears in Exhibit FS9 in relation to the opponent's social media statistics. (I note that the screenshots of the opponent's public social media pages in Exhibit FS9 post-date the relevant date.) Ms Steer states that the opponent communicates with all "Thrive members" on a fortnightly basis via an electronic newsletter. An example is contained in Exhibit FS12 from December 2020: the use of the mark is as in the previous paragraph. This is also the form of the mark shown on event stands in Exhibit FS13 at the Southern Education Show 2017; the National Education Show 2019, Cardiff; the Northern Education Show 2019; the ACE Aware Nation 2018; the GwE Regional Conference 2018; the Southern Education Show 2018; the Academies Show 2017; and Sandringham School's Mental Health Conference 2017.

24. That the use of a mark has been with other matter is not necessarily a bar to a finding of enhanced distinctive character; it depends on the facts of the case, including the nature of the use and the distinctiveness of the mark itself. In *Société des Produits Nestlé SA v Mars UK Ltd*, Case C-353/03, the CJEU held that a mark may acquire a distinctive character as a result of it being used as part of, or in conjunction with, another mark. The CJEU stated in *Specsavers v Asda* Case C-252/12, at paragraph 23, that it is necessary that "the relevant class of persons actually perceive the product or service at issue as originating from a given undertaking."

25. THRIVE inherently has no more than a low degree of distinctive character. If the mark relied upon was inherently of a reasonably high distinctive character, the addition

of weak or non-distinctive elements would not alter the inherent or enhanced capacity of the mark to signify the services as originating from a given undertaking. The relative distinctiveness of the earlier mark and the components added to it in use are relevant factors to take into account in the assessment. Adding “Let’s help every child” to the earlier mark, and representing THRIVE in lower case to match the other words, creates a phrase or sentence in which ‘thrive’ loses distinctiveness. Adding the extra wording alters the perception of the mark. It is not possible to find that the use in this form has enhanced the inherent level of distinctiveness of THRIVE, solus.

26. The use on the opponent’s website during the six months prior to the relevant date was like this:¹²



27. In 2020, the opponent’s website had over 1.4 million views from over 210,000 users. Some further examples of website use from the internet archive, the Wayback Machine, are provided in Exhibit FS7, also showing the mark in the previous paragraph and an earlier variation of it:

¹² Exhibit FS2.

July 2011

The screenshot shows the Thrive website homepage from July 2011. At the top left is the Thrive logo with the tagline "emotional development for wellbeing and learning". To the right is a "my account" section with fields for Username and Password, and buttons for "forgot password" and "login". Below the logo is a navigation menu with links: Home, About Us, Our Approach, Benefits, Services/Costs, Resources, and Contact Us. The main content area features a large banner with a photo of a young girl with colorful handprints. The text reads: "Thrive is a dynamic developmental approach to working with vulnerable and challenging children that provides practical strategies to address their needs." Below the banner are three columns of featured content: "Events and news" (Check out our recent activity), "Wellbeing, Behaviour and Learning" (Find out about our approach), and "Outcomes for children" (Thrive Users' Findings). A sidebar on the right lists "Resources" including publications, articles, group work, and blogs.

October 2017

The screenshot shows the Thrive website homepage from October 2017. The top navigation bar includes "The Thrive Approach", "What's Involved", "Thrive Courses", "Who we work with", "News & views", "Contact us", "Log on to Thrive-Online", and "Member area". The main banner features a photo of a teacher interacting with children in a classroom. The headline reads: "Every child needs to feel valued, involved and appreciated." Below the headline is a paragraph: "We know more now than ever before about what helps to develop healthy curious minds and happy, confident and creative children." Another paragraph states: "If children have been emotionally thrown off track, either temporarily or over longer periods, Thrive helps us understand the needs being signalled by their behaviour and gives us targeted strategies and activities to help them re-engage." Two buttons are present: "More on the Thrive Approach" and "View our free Online Assessment System". Below the banner is a "Upcoming events" section with three course listings: "Annual Trainer Seminar" (Advanced Course, 1 Day, 6 Places Left, Free event), "Thrive-Online Refresher" (Intermediate Course, 1 Day, 11 Places Left), and "Family Thrive for Practitioners and Trainers - 2 days" (Intermediate Course, 2 Days, 1 Place Left, Selling fast). To the right is a "Latest news" section with a featured article titled "Playtime for Children with Autism" by Charlie Dyer, dated 15th September 2017. A "Browse all Thrive Courses" button is at the bottom left, and a scroll-up arrow is at the bottom right.

January 2019

thrive The Thrive Approach What's Involved Thrive Courses Who we work with News & views Contact us Log on to Thrive-Online Member area

Thrive Courses

We offer a range of Foundation, Licensed, Intermediate and Advanced courses to suit professionals, parents and carers.

Select the course type you are interested in to see all courses available.

- Awareness courses**
To introduce you to the theory and concepts of Thrive and how it can be used to support young people in their settings.
[View awareness courses](#)
- Foundation courses**
Designed to introduce the Thrive Approach, these training days are tailored to the needs of staff in education and Adoptive and Foster parents.
[View foundation courses](#)
- Licensed courses**
Licensed courses lead to a Licensed Practitioner qualification, which allows the practitioner to assess the needs of all children and young people as an every child approach, and support them with individual action plans.
[View licensed courses](#)
- Intermediate courses**
Open to Licensed Practitioners and above, intermediate courses are designed to increase the practitioners understanding of a variety of aspects of the Thrive Approach as part of their continuing professional development (CPD).
[View intermediate courses](#)
- Advanced courses**
Open to Licensed Practitioners and above. They provide continuing professional development (CPD) for those looking to gain Course Leader and Licensed Trainer qualifications.
[View advanced courses](#)

August 2020

thrive About Thrive Who we work with The Thrive Approach Thrive training News and views Contact us LOGIN TO THRIVE

THRIVE INSIGHT WEBINARS

A NEW series of webinars looking at issues impacting the social and emotional development of children and young people, led by Thrive trainers and open to anyone.

[FIND OUT MORE](#)

Who we work with

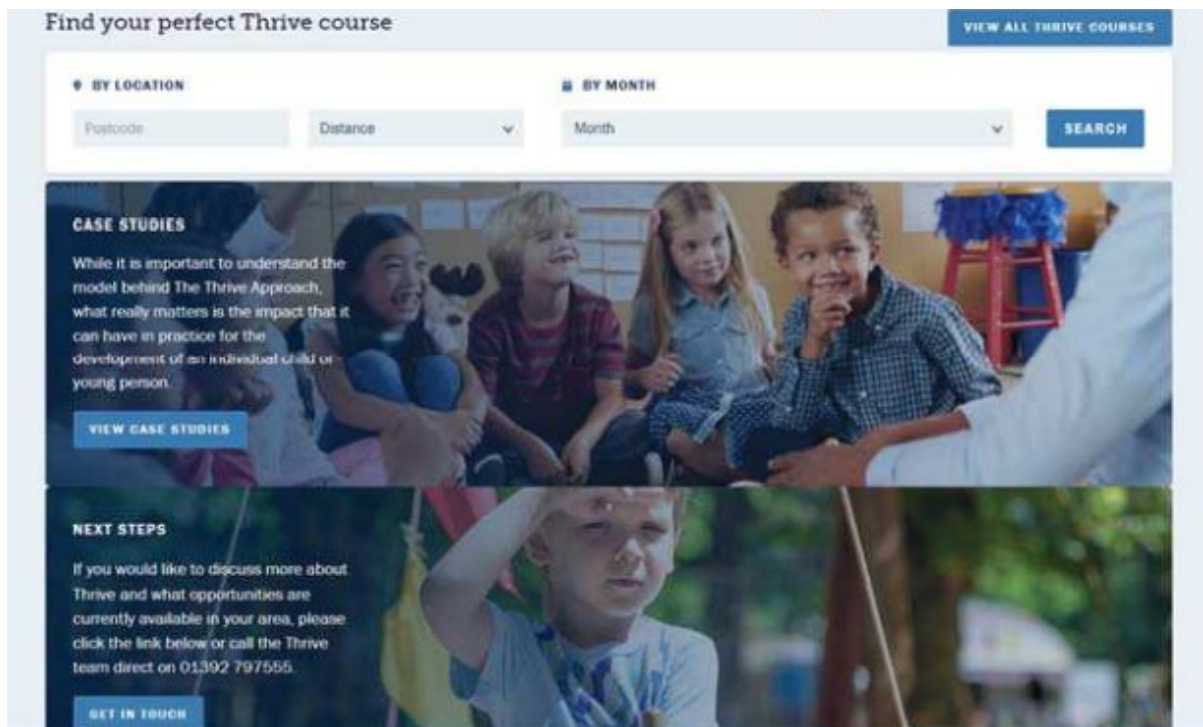
Thrive promotes children's and young people's positive mental health by helping adults know how to be and what to do in response to their differing and...

HOME > THRIVE TRAINING

Thrive training

From an introductory session to evolving and embedding the Approach, embarking on your Thrive training journey will ensure you can support the social and emotional development of all the children and young people you work with.

[VIEW ALL COURSES](#)



28. Although this use is also with another component, the rainbow-swirl device, 'thrive' has not been subsumed into a non-distinctive sentence or phrase. Going back to *Société des Produits Nestlé SA v Mars UK Ltd*, Case C-353/03, i.e. a mark may acquire a distinctive character as a result of it being used as part of, or in conjunction with, another mark, I consider that this use may potentially contribute to enhancement of distinctive character of THRIVE. The elliptical nature of the word, as registered and as used in this form, would still enable the relevant class of persons to perceive the services as originating from a given undertaking. Even if that were not the case, the website screenshots above show use of THRIVE/Thrive, solus.¹³ For example: "Thrive is a dynamic developmental approach..." (July 2011); "Thrive helps us understand..." and "Family Thrive for Practitioners and Trainers" (October 2017); "Thrive Courses" (January 2019); "About Thrive", "Thrive Insight Seminars", "...led by Thrive trainers and open to anyone", "Thrive Training", "Click here to explore all Thrive courses", "Find your perfect Thrive course" and "If you would like to discuss more about Thrive and what opportunities are currently available..."(August 2020).

¹³ Professor Ruth Annand, sitting as the Appointed Person in *Bentley Motors Limited v Bentley 1962 Limited*: "16. A word trade mark registration protects the word itself (here BENTLEY) written in any normal font and irrespective of capitalisation and, or highlighting in bold (see e.g. Case T-66/11, Present-Service Ullrich GmbH & Co. KG v. OHIM, EU:T:2013:48, para. 57 and the cases referred to therein, BL O/281/14,)."

29. Ms Steer states that, since 2008, 10,558 school staff, community groups, health practitioners, parents and carers have been trained as Thrive Licensed Practitioners. Before the Covid-19 pandemic, the training consisted of ten in-person training days over a three month period. At least 55,949 staff across the UK have attended THRIVE induction or whole/school training sessions since 2012, which are half or full-day sessions. One million children “have been registered to Thrive”. 5,088 settings in the UK have subscribed to the opponent’s services, including nurseries, pre-schools, primary schools, secondary schools and specialist units. Establishments which had used the opponent’s services displayed the following logos or badges on their premises and websites, as from 2016 and 2019, respectively:



30. The opponent’s turnover and marketing spend in the five years prior to the relevant date was as follows:

Year	Turnover	Marketing
2016	£2,656,750	£106,907
2017	£3,153,868	£115,984
2018	£3,612,595	£218,520
2019	£3,773,025	£298,504
2020	£3,193,896	£253,736

31. Marketing has taken place in the form of promotional material, event attendance, direct marketing campaigns and paid-for advertising. Examples of advertising and publicity in *The Times Educational Supplement (TES)* are included in Exhibit FS11. I note that the mark in the “Let’s help every child thrive” form was in use, but also references to ‘Thrive’; e.g. “Invest in Thrive” and “Discover Thrive”.

32. Ms Steer states that THRIVE has been included in a number of university and public sector-based studies. Extracts from the studies are shown in Exhibits FS15, FS16, FS17 and FS18; the studies were undertaken by the University of Brighton (2015), Bath Spa University (2015), the Office for Public Management (2013), and the Department for Education (2018). I note the authors’ references to “The Thrive Approach”, “Thrive”, “the THRIVE approach”, “THRIVE training”, “continued integration of THRIVE”, and “THRIVE principles”. Ms Steer states that the impact of THRIVE has been picked up by Ofsted and Estyn during school inspections:

- i. *“School leaders are also supporting pupils’ mental well-being through their ‘Thrive’ approach, and the designated ‘Thrive’ room provides a quiet and calming reflection space”* Ofsted Report for Martlesham Primary Academy, 14 November 2018;
- ii. *“The ‘Thrive’ programme has helped to identify some of the root causes of poor attendance. Providing this additional support has helped pupils, especially those with complex needs, to manage their behaviour and attend better. This nurturing and caring environment helps pupils with additional needs settle more quickly, receive more support, and enjoy learning more”* Ofsted Report on Saxmundham Primary School, 14 March 2018; and
- iii. *“Early help, both internally, through the school’s ‘Thrive’ initiative, and from external agencies, is put into place swiftly for those pupils who need it”* Ofsted Report on Thomas Arnold Primary School, 14 November 2018.

33. Ms Steer exhibits a number of press articles which feature the opponent’s earlier mark, such as:

- *TES*, 3 December 2020:
““The framework emphasises the option for pupils to have alternative provision for some topic areas where sensitivities may be known. However, there will be many young people who haven’t been identified,” argues Rose Webb, a former RE and PSHE teacher and social, emotional and mental health specialist at the organisation Thrive. “It sometimes isn’t until these things are touched on in curriculum content that things come to light.””

- Nursery World, 16 March 2020:
“Lee Prichard is head of UK regional development at Thrive, which provides training in children’s social and emotional development.”
- Early Years Educator, 11 June 2020:
“Dr Jack Lewis, Kim S Golding and Dr Suzanne Zeedyk will be giving a series of live webinars in June and July, organised by Thrive, which trains teachers and other education professionals to support children’s mental and emotional well-being.”

34. 55,949 staff across the UK have attended THRIVE induction or whole/school training sessions since 2012; in the year prior to the relevant date, the opponent’s website had 1.4 million views from over 210,000 users; the opponent’s turnover has been over £3 million per year; 5,088 establishments have subscribed to the opponent’s services; there are frequent references to THRIVE in the education sector’s major publication, *TES*; universities and the Department of Education have issued studies involving THRIVE services; and Ofsted and Estyn school inspectors have made references to THRIVE in their primary school inspection reports. Although Ms Steer states that the services have been provided to teachers, parents and carers, the evidence overwhelmingly points to the services having been provided to teachers. Putting all the evidence together, I conclude that the inherently low distinctiveness of the earlier mark has been enhanced through use for training for professionals in education to support the social and emotional development of children and young people, from early years through to adolescence, to a medium level given the low inherent starting point.

Comparison of services

35. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all

the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

36. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

37. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (*OHIM*), Case T-325/06, the General Court of the European Union (“GC”) stated that “complementary” means:

“82 ... there is a close connection between [the goods], in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking...”.

38. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is capable of being the sole basis for the existence of similarity between goods and services.

39. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks)* (*IP TRANSLATOR*) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category

of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

40. In *Avnet Incorporated v Isoact Limited* [1998] F.S.R. 16, Jacob J. stated that:

"In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase."

41. The parties' services are shown in the table below:

The opponent's services	The applicant's services
<p><i>Class 41: Education services; training services; educational courses; educational services; consultancy and advisory services relating to education; arrangement of conferences for educational purposes; dissemination of educational materials; excluding services used in connection with dental and veterinary sectors.</i></p>	<p><i>Class 43: Nurseries; day-nurseries; day care centres for children; child care centres; out of school care centres; crèches; crèche services; provision of day care services for infants, pre-school children and school age children; provision of day nursery services; provision of before-school care; provision of after-school care; out of school clubs for children; child minding services; provision of breakfast clubs for children; preparation and provision of meals for children; all being nursery services for pre-school age children, and none being educational services.</i></p>

42. The applicant has added a positive limitation to all of its services, with the effect that they are all "nursery services for pre-school age children." It has also added an exclusion, with the intended effect that none of the services are educational. These

qualifications, positive and negative, are no doubt intended to remove any similarity between the parties' services. However, the exclusion does not necessarily mean that there is no similarity with the opponent's services. Children are encouraged to play at nursery but there is also an educational aspect to their play, increasingly so as they near primary-school entrance age. They learn the alphabet and to count in a fun way, such as through songs and picture recognition. They learn about nature, food, and where they live. For this reason, I consider that the exclusion "none being educational services" does not exclude the potential for similarity. The exclusion appears meaningless for "preparation and provision of meals for children", which are not educational. The positive limitation of "all being nursery services for pre-school age children" is nonsensical when applied to *provision of day care services for [...] school age children*.

43. I will begin by making the comparison on the basis of the opponent's 'education services' and 'educational services', which are wide terms and which are the closest to the applicant's services, before looking at the services for which the earlier mark has been used, giving it an enhanced level of distinctive character for those services only.

44. *Nurseries; day-nurseries; provision of day nursery services; crèches; crèche services; child minding services; day care centres for children; child care centres; provision of day care services for infants, pre-school children and school age children.*

These services, apart from the anomalous reference to school age children, dealt with above, are limited to all being nursery services for pre-school age children. The opponent's services are unlimited and include nursery schools which provide education to children of pre-primary school age. There is some similarity of nature in that both of the parties' services entail groups of children. The users are the same: parents (who choose the nursery or child care) and their children. The core purpose of the opponent's services is to provide learning, whilst the core purpose of the applicant's services is to provide care. However, as already discussed, care at nurseries includes educational play. This also applies to *crèches* and *child minding services*. There is a degree of similarity in purpose as care of very young children means that they must not only be kept safe but entertained. Educational play is part

of that entertainment. Care of very young children and education at nurseries have a complementary relationship. This also applies to day care services for school-age children (i.e. in the school holidays), who may still be very young (the positive limitation does not make sense for school-age children). The parties' services will be provided together in respect of the applicant's *Nurseries; day-nurseries; provision of day nursery services* meaning the trade channels are identical. I consider this also to be the case for the other services listed in the group above; there is little, if any, practical difference between the terms in the specification. There is a high level of similarity between the parties' services.

45. Provision of breakfast clubs for children; provision of before-school care; provision of after-school care; out of school care centres; out of school clubs for children.

Although some of these services refer to before, after and out of school care, the positive limitation means that these services apply to pre-school children. However, the limitation applies to services provided before nursery (school), after nursery (school) and to nursery-school age children out of term-time. Including breakfast clubs, before and after school care is designed to provide care to children either side of the 'free' state-provided part of the nursery school day, whilst their parents are at work. As above, the nature of both parties' services is that they are provided to groups of children. They must not only be kept safe but entertained. Educational play is part of that entertainment; for example, physical education. This leads to similarity in purpose and channels of trade. Whilst the educational aspect of these services may not be as pronounced as for the first group of services, there is still a medium level of similarity between the parties' services.

46. Preparation and provision of meals for children

These do not share nature, purpose, method of use and are not complementary or in competition with any of the opponent's services. I bear in mind that establishments which provide educational services also feed the children attending the establishment. Children attending nursery school will be fed at the premises. There is a very low degree of similarity between the parties' services.

47. My finding of enhanced distinctive character does not cover all of the services for which the earlier mark is registered. It covers training for professionals in education to support the social and emotional development of children and young people, from early years through to adolescence, but not education services at large. Furthermore, the services are not provided to children. The services 'teach the teacher'. This involves a different set of consumers to the comparison made above. Consequently, the opponent is no better off, in terms of the comparison between the services and the part that plays in the likelihood of assessment, by relying upon enhanced distinctive character.

The average consumer and the purchasing process

48. As the caselaw cited above indicates, it is necessary to decide who the average consumer is for the parties' goods and services and how they purchase them. "Average consumer" in the context of trade mark law means the "typical consumer."¹⁴ The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*.

49. The care and education of children is of high importance to parents, who will pay a high degree of attention to where their children attend. I do not agree with the opponent's submission that the average consumer is likely to pay a low to medium level of attention. Word of mouth recommendation is likely to play a significant part in the selection process, as will visual inspection of the premises, literature, websites and reviews.

¹⁴ *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).


Comparison of marks

50. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in 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.”

51. 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.

52. The marks to be compared are:

The opponent’s mark	The applicant’s series of marks
THRIVE	

53. The overall impression of the earlier mark rests in the single element of which it is comprised: THRIVE.

54. Although the devices in the two marks in the applicant's series are the same, the proportions of the devices within the marks are different. The device, a larger circle intersected at the bottom right by a smaller circle, is larger in the second mark. It is more dominant in the second mark; that said, in both marks it has a prominent position, either at the front of the mark or at the top of it. Despite the sizes and prominent positions of the devices, the eye is drawn to the word component which takes up the largest proportion of the marks. 'Thrive' is emboldened. All the elements contribute to the overall impression of the mark, but the word element is more dominant. I have referred above to the low inherent distinctiveness of THRIVE/Thrive.¹⁵ 'Childcare and Education' has no distinctive character for the applicant's services, contributing little weight to the overall impression of the applicant's marks.

55. There is a single point of visual and aural convergence between the marks: THRIVE/Thrive. This is one word out of four in the application. Taking into account the other words and the device, there is a low level of visual similarity between the marks. There is a higher level of aural similarity because the device will not be articulated. The first word spoken in the applicant's marks will be Thrive. The parties' marks are aurally similar to a medium degree.

56. The device does not have a concept so is a neutral factor in the conceptual comparison. Childcare and Education have obvious meanings. I have given the meaning of THRIVE/Thrive earlier in this decision, a meaning which is the same in the parties' marks. There is a medium degree of conceptual similarity between the parties' marks.

¹⁵ *Ravensburger AG v OHIM*, GC, Case T-243/08: "27.... The reputation of an earlier mark or its particular distinctive character must be taken into consideration for the purposes of assessing the likelihood of confusion, and not for the purposes of assessing the similarity of the marks in question, which is an assessment made prior to that of the likelihood of confusion (see, to that effect, judgment of 27 November 2007 in Case T-434/05 *Gateway v OHIM – Fujitsu Siemens Computers (ACTIVY Media Gateway)*, not published in the ECR, paragraphs 50 and 51)."

Likelihood of confusion

57. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. One of those principles states that a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa. In this case, the parties' services are similar to a high, medium and very low level.

58. The additional elements in the application mean that it is unlikely that the marks will be imperfectly recalled and mistaken for one another; in other words, there will be no likelihood of 'direct' confusion. The other way in which a likelihood of confusion can arise is where the average consumer is 'indirectly' confused. This type of confusion was explained by Mr Iain Purvis QC, sitting as the Appointed Person, in *Back Beat Inc v L.A. Sugar (UK) Limited*, BL O/375/10:

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

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that

no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

59. That the three categories in that case are non-exhaustive was confirmed by the Court of Appeal in *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others*.¹⁶ This case is closest to category b): the opponent’s mark is contained within the mark and the non-distinctive elements Childcare and Education have been added to the common element. However, there is also the device in the applicant’s marks to consider.

60. I find that there is no likelihood of indirect confusion in relation to *preparation and provision of meals for children; all being nursery services for pre-school age children, and none being educational services*. The combination of the low distinctiveness of the common element and the very low level of similarity between the parties’ services will avoid a likelihood of confusion.

61. I find that there is a likelihood of indirect confusion for all of the other services in the application. In *Planetart LLC and Anor v Photobox Limited and Anor* [2020] EWHC 713 (Ch), Mr Daniel Alexander QC, sitting as a Deputy Judge of the High Court, observed:

¹⁶ [2021] EWCA Civ 1207

“21. Second, the Claimants submit that, as regards the comparison of marks combining verbal and figurative elements, the verbal elements should be considered more distinctive than the latter. They refer to *Wassen International Ltd v OHIM (T-312/03) EU:T:2005:289*, applied and approved by HHJ Hacon in *Bentley 1962 Ltd & Anor v Bentley Motors Ltd [2019] EWHC 2925 (Ch)* at para [66]: (“... where a trade mark is composed of verbal and figurative elements, the former should, in principle, be considered more distinctive than the latter, because the average consumer will more easily refer to the goods in question by quoting their name than by describing the figurative element of the trade mark.”). While true in general, this is not a warrant for disregarding important visual elements of a logo mark.”

62. This might particularly be so where the words to be considered are lacking distinctive character. In the present case, whilst the device is prominent in the applicant’s marks, I do not think it avoids a likelihood of confusion, even where the common element, THRIVE, is low in distinctive character. Even where a high degree of attention is paid, the device is a separate element which will be perceived as an embellishment or brand variation on the plain word mark THRIVE, the common element. It will not feature in aural perception of the marks during the selection process. Whilst I have not forgotten that I should not simply take one component of the applicant’s marks and compare it with the earlier mark, the additional words in the application simply state what services are provided. Further, they do not create a unitary meaning with THRIVE, which retains a distinctive significance which is independent of the significance of the whole of the applicant’s marks. THRIVE comprises the whole of the earlier mark.¹⁷ Thrive Education and Childcare does not make sense as a whole. The average consumer would not perceive Thrive Education and Childcare as a unit having a different meaning to the separate words. THRIVE/Thrive has an identical meaning in both parties’ marks and the only other concept arises from words which are descriptive of the services covered by the parties’ marks.

¹⁷ *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another [2015] EWHC 1271 (Ch)*.

Section 5(2)(b) outcome

63. The section 5(2)(b) ground fails in respect of *preparation and provision of meals for children; all being nursery services for pre-school age children, and none being educational services.*

64. The section 5(2)(b) ground succeeds, depending on the outcome of the attacks on the earlier mark, in respect of *Nurseries; day-nurseries; day care centres for children; child care centres; out of school care centres; crèches; crèche services; provision of day care services for infants, pre-school children and school age children; provision of day nursery services; provision of before-school care; provision of after-school care; out of school clubs for children; child minding services; provision of breakfast clubs for children; all being nursery services for pre-school age children, and none being educational services.*

Section 5(3) of the Act

65. Section 5(3) states:

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

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

66. The relevant case law in relation to section 5(3) can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case C-

252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and Case C-487/07, *L'Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows:

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact on the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

67. For a successful claim under section 5(3), cumulative conditions must be satisfied by the opponent: similarity between the marks; a qualifying reputation in the earlier mark; a link between the marks (the earlier mark will be brought to mind on seeing the later marks); and one (or more) of the claimed types of damage (unfair advantage and/or detriment to distinctive character and/or detriment to the repute of the earlier mark). It is not necessary that the services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the relevant public will make a link between the marks.

68. The first condition of similarity between the marks is satisfied, as found earlier in this decision.

69. The next condition is reputation. Reliance upon this ground requires evidence of a reputation amongst a significant part of the relevant public, as stated in *General Motors*:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation ‘in the Member State’. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation ‘throughout’ the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

70. Earlier in this decision, I found that the earlier mark benefits from an enhanced degree of distinctive character in relation to training for professionals in education to support the social and emotional development of children and young people, from early years through to adolescence. I find also that the opponent’s mark has reached the knowledge threshold, and therefore the requisite reputation for these services, but not for the wider *Education services; training services* relied upon under this ground.¹⁸

¹⁸ See the judgment of HH Judge Hacon in *Burgerista Operations GmbH v Burgista Bros Limited* [2018] EWHC 35 (IPEC) at paragraph 69: “(6) Reputation constitutes a knowledge threshold, to be assessed according to a combination of geographical and economic criteria.”

71. As noted in the caselaw summary above, my assessment of whether the public will make the required mental 'link' between the earlier marks and the application must take account of all relevant factors. One of those factors is the relevant public. The CJEU said, in *Intel*:

"The relevant public

33 The public to be taken into account in order to determine whether registration of the later mark may be declared invalid pursuant to Article 4(4)(a) of the Directive varies depending on the type of injury alleged by the proprietor of the earlier trade mark.

34 First, both a trade mark's distinctiveness and its reputation must be assessed, first, by reference to the perception of the relevant public, which consists of average consumers of the goods or services for which that mark is registered, who are reasonably well informed and reasonably observant and circumspect (as regards distinctive character, see Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 34; as regards reputation, see, to that effect, *General Motors*, paragraph 24).

35 Accordingly, the existence of injury consisting of detriment to the distinctive character or the repute of the earlier mark must be assessed by reference to average consumers of the goods and services for which that mark is registered, who are reasonably well informed and reasonably observant and circumspect.

36 Secondly, as regards injury consisting of unfair advantage taken of the distinctive character or the repute of the earlier mark, in so far as what is prohibited is the drawing of benefit from that mark by the proprietor of the later mark, the existence of such injury must be assessed by reference to average consumers of the goods or services for which the later mark is registered, who are reasonably well informed and reasonably observant and circumspect.

[...]

46 It is possible that the conflicting marks are registered for goods or services in respect of which the relevant sections of the public do not overlap.

[...]

48 It is therefore conceivable that the relevant section of the public as regards the goods or services for which the earlier mark was registered is completely distinct from the relevant section of the public as regards the goods or services for which the later mark was registered and that the earlier mark, although it has a reputation, is not known to the public targeted by the later mark. In such a case, the public targeted by each of the two marks may never be confronted with the other mark, so that it will not establish any link between those marks.”

72. If the respective relevant publics for the parties’ services are not the same and do not overlap, it is difficult to see how a link would be made. The relevant public for the services for which the opponent has a reputation comprises teachers. The relevant public for the applicant’s services, in class 43, comprises parents seeking nursery care and the provision of meals for pre-school children. In *Intel*, one of the factors the CJEU said should be taken into account in order to decide whether the public will make a link between the earlier mark and the later mark is “*The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered*” (emphasis added).¹⁹ The earlier mark’s reputation in the registered services is not so strong that it goes beyond its relevant public.²⁰ The section 5(3) ground fails.

Section 5(3) outcome

73. The section 5(3) ground fails.

¹⁹ See also *Tulliallan Burlington Ltd v EUIPO*, Case T-123/16, GC.

²⁰ *Intel*, paragraph 51.

Overall outcome

74. The opposition fails in respect of *preparation and provision of meals for children; all being nursery services for pre-school age children, and none being educational services.*

75. If the earlier mark remains registered for the services considered in this decision, the section 5(2)(b) ground will succeed against the applicant's *Nurseries; day-nurseries; day care centres for children; child care centres; out of school care centres; crèches; crèche services; provision of day care services for infants, pre-school children and school age children; provision of day nursery services; provision of before-school care; provision of after-school care; out of school clubs for children; child minding services; provision of breakfast clubs for children; all being nursery services for pre-school age children, and none being educational services.*

76. This is a provisional decision in respect of the services for which the opponent has been successful. A final decision in respect of these services (in paragraph 75) will be made once the outcome of the cancellation proceedings is known. These proceedings are suspended until such time.

77. The period for appeal will run from the date of my final decision.

Costs

78. Costs will be covered in the final decision when the full outcome of this opposition becomes clear.

Dated this 24th day of August 2022

Judi Pike
For the Registrar