



Neutral Citation Number: [2022] EWHC 3156 (Ch)

Case No: CH-2018-000117

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST

ON APPEAL FROM THE TRADE MARKS REGISTRY

IN THE MATTER OF Trade Mark Application No.3175431 in the name of SKA Trading Ltd
AND IN THE MATTER OF Opposition No. 407756 thereto by Shine TV Limited

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/12/2022

Before :

MRS JUSTICE JOANNA SMITH DBE

Between :

SHINE TV LIMITED

Appellant

- and -

SKA TRADING LTD
(in substitution for MR CHEF LIMITED)

Respondent

Ms Chantrielle (instructed by **Simmons & Simmons LLP**) for the **Appellant**
Mr Muir Wood (instructed by **Trade Mark Wizards Ltd**) for the **Respondent**

Hearing date: 6 December 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Joanna Smith:

1. This is a statutory appeal under section 76 of the Trade Marks Act 1994 (“**the TMA**”) from a decision of the Hearing Officer acting for the Registrar of Trade Marks (“**the Decision**”) in respect of an opposition (“**the Opposition**”) to application No. 3175431 (“**the Application**”) for the word mark **MISTER CHEF** (“**the Contested Mark**”).
2. The appeal raises a short point as to the approach taken in the Decision to conceptual similarity. In particular it is the case of the Appellant, Shine TV Limited (“**Shine**”), that the Hearing Officer erred in principle because he only considered one possible meaning of the earlier mark (“**MASTERCHEF/MASTER CHEF**”) when carrying out his assessment. It is the Appellant’s case that this error was determinative in his finding that there was no likelihood of confusion. It is accepted by SKA Trading Ltd (“**SKA**”) that if Shine is right about this error, then the appeal must succeed.
3. In or around July 2021, ownership of the Contested Mark was transferred from MR CHEF LIMITED to SKA. All references to SKA in this judgment will be to SKA or its predecessor.

Background to the Appeal

4. The Application was filed on 19 July 2016 and seeks registration for the following goods (the “**Goods**”) in class 21:

“baking tins and utensils, cake decorating, aluminium trays, silicone moulds, baby products, freezer products, cupcake carriers, chocolate mould, blenders; aluminium bakeware; aluminium cookware; aluminium moulds [kitchen utensils]; bakeware; baking dishes; baking tins; baking trays made of aluminium; baking utensils; basting brushes; cooking pans; cooking pans [non-electric]; cooking pot sets; cooking pots; cooking pots and pans [non-electric]”.
5. Shine’s Opposition (under opposition number 407756) was based on four earlier marks or applications (together “**the Earlier Marks**”), namely UK 2118654, UK 2563306, EU 8316135 and EU6952733. The Earlier Marks each comprise the word MASTERCHEF (with UK registration 2118654 covering a series of three marks, including two minor variations to the presentation of the word, i.e. MASTER CHEF and MasterChef). Each of the Earlier Marks, with the exception of UK 2563306, is registered in class 21. UK 2563306 (“**the Second UK Mark**”) is registered for goods and services in various different classes, including class 41 (“*entertainment services, namely a television series in the reality genre in the field of cooking and food; production and presentation of competitions, games and studio entertainment*”).
6. The grounds of opposition relied on were twofold; first in respect of UK 2118654, EU 8316135 and EU6952733, under section 5(2)(b) of the TMA which provides that:

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

...

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

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

7. The second ground of opposition was made pursuant to section 5(3) of the TMA in the case of the Second UK Mark. Section 5(3) is in the following terms:

“(3) A trade mark which-

(a) Is identical with or similar to an earlier trade mark...

(b) ...

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom...and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark”.

8. Each of the Earlier Marks, except EU 8316135, was registered more than 5 years prior to the date of publication of the Contested Mark. Although SKA requested proof of use of the Earlier Marks, it failed to particularise its request and the request was accordingly struck out by the Registrar. In the circumstances, Shine was entitled to rely on the registrations of its Earlier Marks (in so far as they fell within class 21) without having to show use.

9. Shine filed a witness statement in support of its section 5(3) opposition, showing the worldwide and UK notoriety of the MASTERCHEF TV show. SKA filed no evidence.

10. A hearing took place before the Hearing Officer on 27 March 2018. SKA was represented at the hearing. Shine was not represented, but (as the Hearing Officer records at [12] of the Decision), it filed written arguments “in lieu of attendance”.

The Decision

11. The Hearing Officer made a number of findings in the Decision which are not challenged on this appeal. In the context of section 5(2)(b) of the TMA he:

i) held that all of the Goods identified in the Application must be considered to be identical to those covered by EU 8316135 and that some of the Goods are identical to some of the goods covered by UK 2118654 ([18] and [19] of the Decision).

ii) summarised the general principles to be applied to the assessment of likelihood of confusion ([20] of the Decision).

iii) held that the average consumer is likely to be either a professional cook/restaurant business or a member of the general public with an interest in cooking (or someone buying cookware/bakeware for such a person) and that the Goods were likely to be selected by consumers paying a normal degree of attention ([21] of the Decision).

- iv) held that the selection process was likely to be “mainly visual” but that “oral recommendations and orders will also play some part”, such that “the way the marks sound must also be considered” ([22] of the Decision).
 - v) summarised the law relating to distinctiveness ([23] of the Decision).
 - vi) held that because there was no evidence of use of MASTERCHEF/MASTER CHEF in the UK prior to the relevant date in relation to goods in Class 21, the distinctive character of the mark rests on its inherent level of distinctiveness ([25] of the Decision).
 - vii) held 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 ([26] of the Decision); and
 - viii) held that the marks were visually and aurally similar to “quite a high degree” ([27] and [29] of the Decision).
12. Pausing there, the Grounds of Appeal include complaints to the effect that the Hearing Officer’s assessment of both visual and aural similarity was flawed, complaints which were not pursued at the hearing before me.
13. However, Shine challenges the Hearing Officer’s assessment of the conceptual similarity of the marks in [30] of the Decision:
- “30. [Shine] submits that the marks are also conceptually similar. I disagree. MISTER is plainly a title for an adult male. The meaning of CHEF is obvious. The combination conveys the meaning of a person or chef called Mister Chef. By contrast, the word MASTER in MASTERCHEF/MASTER CHEF will be understood by relevant average consumers as meaning “a skilled practitioner of a particular art or activity”. Therefore MASTERCHEF/MASTER CHEF means a highly skilled chef. That means that, when compared as wholes, the marks have quite distinct meanings. I therefore find that the marks are conceptually dissimilar”.
14. By footnote 4 to this paragraph, the Hearing Officer noted that the meaning of ‘Master’ to which he had referred was “Per the third meaning in the Oxford English Dictionary”.
15. The finding of conceptual dissimilarity was a key factor in the Hearing Officer’s conclusion that there was no likelihood of confusion amongst average consumers:
- “31. The goods are identical and the marks are quite highly similar to the eye and to the ear. These factors point towards a likelihood of confusion. On the other hand, the marks are conceptually dissimilar and it is well established that conceptual differences may counter visual and aural similarities, although they do not always do so.

32. There are two other particularly relevant factors. Firstly, the difference between the marks is towards the beginning of the marks and, as a rule of thumb, these tend to be noticed more than a difference in the middle or at the end of words. Secondly, the earlier marks have a below average degree of distinctiveness for cookware and kitchen goods.

33. Weighing all the relevant factors against one another, I find that the differences between the respective marks are sufficient to avoid a likelihood of confusion. In coming to this conclusion I have considered the possibility of confusion through consumers misreading or mishearing one mark for the other, which appears to me to be the high point of the opponent's case. However, I have decided that the visual and aural difference towards the beginning of the respective marks, in combination with the different meanings of MISTER CHEF and MASTERCHEF/MASTER CHEF, are sufficient to avoid any significant level of confusion amongst average consumers. I have also considered the possibility of confusion occurring through imperfect recollection. However, I find that the different meanings of the marks make this unlikely".

16. In light of these findings, the Hearing Officer held that the opposition under section 5(2)(b) of the TMA failed.
17. I pause again to note that, although I was taken to various authorities as to the circumstances in which conceptual differences will be capable of countering visual and aural similarities, there is no appeal from the finding that the conceptual differences in this case (if the Hearing Officer was right that there were such differences) were capable of countering the visual and aural similarities.
18. An important part of the appeal concerns a submission by Shine that the Hearing Officer's assessment in paragraph [30] of the Decision was foreshadowed by observations that he made in paragraph [24] on the issue of inherent distinctiveness:

"24. The word 'Chef' is self-evidently highly allusive of the character of goods for use by chefs or in cooking (including baking). MASTERCHEF (or MASTER CHEF) designates a top chef. In the context of cooking goods, there is a clear allusion to goods that are good enough for use by a master chef. I therefore find that both the CHEF element, and the earlier mark as a whole, have a below average degree of inherent distinctiveness in relation to the goods at issue".

19. When turning to deal with section 5(3) of the TMA, the Hearing Officer:
 - i) summarised the general principles to be applied to the assessment under section 5(3) of the TMA ([20] of the Decision); and

- ii) found that the Second UK Mark had a substantial reputation for “a television series in the reality genre in the field of cooking and food and presentation of competitions, games and studio entertainment” ([37] of the Decision).
20. From [38] and [39] of the Decision it is clear that the Hearing Officer’s decision on likelihood of confusion led directly to his rejection of the case on section 5(3) of the TMA:

“38. As I noted above, my assessment of whether the public will make the required mental ‘link’ between the marks must take account of all relevant factors. The factors identified in Intel are:

The degree of similarity between the conflicting marks

The respective marks are quite highly visually and aurally similar, but (as a whole) conceptually dissimilar

...

Whether there is a likelihood of confusion

In my view, the differences between the marks and the goods and services are sufficient to avoid a likelihood of confusion. I note that the opponent seeks to rely on the established merchandising of MASTERCHEF goods as a factor which increases the likelihood of the public expecting that MISTER CHEF cookware and bakeware to be connected with the MASTERCHEF TV show. However, the opponent’s evidence does not establish that, at the relevant date, the UK public would have been aware of the merchandising of MASTERCHEF goods. Consequently, this does not assist the opponent’s case.

39. Although the absence of a likelihood of confusion is relevant to the question of whether the relevant public will make a mental link between the marks (in the sense that if there is a likelihood of confusion there is a bound to be such a link), it is not necessarily decisive. However, I find that the UK public would not make any link between, on the one hand, the contested mark and the goods covered by the application and, on the other hand, the earlier mark and the entertainment services for which it has a reputation. The opposition under section 5(3) therefore fails. This is because, unless the public will make a link between the marks, use of the contested mark cannot take unfair advantage of the reputation acquired by the earlier mark”

21. In light of his findings, the Hearing Officer held that, subject to appeal, the Contested Mark would be registered.

Grounds of Appeal

22. The Grounds of Appeal raise issues in relation to the analysis undertaken by the Hearing Officer under both section 5(2)(b) and section 5(3) of the TMA.
23. In so far as they continue to be pursued at this hearing and concern section 5(2)(b) of the TMA, the Grounds of Appeal contend that the Hearing Officer wrongly concluded (at paragraph [33] of the Decision) that the differences between the marks were sufficient to avoid a likelihood of confusion owing to the erroneous approach that he had adopted to the assessment of conceptual similarity (which Shine says, and SKA accepts, was determinative). Although the Grounds of Appeal set out Shine's arguments in a number of paragraphs, the errors as articulated by Ms Chantrielle, appearing on behalf of Shine, are twofold:
 - i) First ("**Ground 1**"), that the Hearing Officer erred in paragraph [30] of the Decision in confining his consideration of conceptual similarity of the marks to only one possible meaning of the term "MASTERCHEF/MASTER CHEF", that referencing the third meaning of "Master" in the Oxford English Dictionary (i.e. "a highly skilled chef"); it was not appropriate to restrict the assessment of conceptual similarity to just one possible meaning, if the average consumer is likely to perceive others. In particular, the average consumer "is likely to perceive that "Master" is also a title used by a boy not old enough to be called "Mr", the fifth meaning in the Oxford English Dictionary. Had the Hearing Officer taken into account this meaning of the word "Master" (i.e. as a title) then he would have concluded that the marks were conceptually similar, since "Mister" is also a title; and
 - ii) Second ("**Ground 2**"), he wrongly assumed in paragraph [24] of the Decision that MASTER CHEF meant "a top chef", an assumption which "may have been" a result of the substantial reputation of the Earlier Marks for the well-known television show (which the Hearing Officer found as a fact in the context of section 5(3) at paragraph 37 of the Decision. This assumption was erroneous where the Hearing Officer had found no evidence of use in the context of EU 8316135 and UK 2118654 and consequently the distinctive character of the mark was based only on its inherent distinctiveness.
24. If Shine succeeds in convincing me that the Hearing Officer should have found that there was likelihood of confusion, then it is common ground that it will also succeed on the issues raised in the Grounds of Appeal under section 5(3) of the TMA (in so far as they remain live), because the question of likelihood of confusion was intrinsic to the decision under section 5(3) of the TMA, i.e. if there had been likelihood of confusion, the Hearing Officer would inevitably have found that there was a link between the Contested Mark and the Earlier Marks.

Appellate Function

25. Both sides addressed me in their skeleton arguments as to the approach I should adopt to this appeal and I was referred to various authorities, including O/039/21 *NINEPLUS* (a decision of Mr James Mellor QC, as he then was, sitting as an Appointed Person) at [14]-[16] and *Yellow Bulldog Ltd v AP & Co Ltd* [2020] EWHC 3558 (Ch), per Morgan J at [29]-[34]). The principles are well known and there is no need for me to set them out in

detail here – I have in any event set them out at some length very recently in *Axogen Corporation v AVIV Scientific Limited* [2022] EWHC 71 (Ch) at [24]-[25].

26. For present purposes, suffice to say that it is common ground that:
- i) this appeal is a review and not a re-hearing;
 - ii) for the appeal to succeed I must be satisfied that the decision below was “wrong” either because the Hearing Officer made an error of law or because his decision was “outside the bounds within which reasonable disagreement is possible”;
 - iii) in a case involving a multifactorial assessment or evaluation, I should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle;
 - iv) I should accord respect to the decision of the Hearing Officer as an expert tribunal charged with applying the law in specialised fields, unless it is clear that there has been a misdirection of law;
 - v) the function of the Hearing Officer is to reach reasoned conclusions but there is no need for him to spell out every matter or deal with every argument.

The Central Issue: the approach to conceptual similarity

The Law

27. During the course of her attractive submissions, Ms Chantrielle took me to various authorities on the correct approach to take to the question of conceptual similarity as a matter of law. I did not understand these submissions to be controversial and the appeal does not turn on what the correct approach actually is, but rather on whether the Hearing Officer in fact adopted that approach in the Decision.
28. Nevertheless, it is useful to include a brief summary of the general approach.
29. For a conceptual message to be relevant it must have a clear and specific meaning and be capable of immediate grasp by the average consumer (see *Ruiz Picasso v OHIM* [2006] E.T.M.R. 29 and *C-328/18 P European Union Intellectual Property Office v Equivalenza Manufactory* at [74]). Instances of counteraction are limited to the “exceptional case”.
30. The question of conceptual similarity must be considered from the standpoint of the average consumer. However, the average consumer is not a mathematical average and the average consumer test is not a statistical test. The average consumer is “a notional person whose presumed expectations are to be taken into account...in assessing the particular question [the court] is called on to decide”. A finding of infringement is not precluded by a finding that many consumers, of whom the average consumer is representative, would not be confused. The court may have regard to the effect of the issue in question upon a “significant proportion” of consumers (see *Interflora Inc v Marks & Spencer Plc* [2015] Bus LR 492, per Kitchin LJ at [128]-[129]).
31. It follows that the notion of an average consumer requires the court to consider any relevant class of consumer, and not to average them (see *The London Taxi Corporation*

v Frazer-Nash Research Ltd [2018] E.T.M.R 7 per Floyd LJ at [31]). Consumers may fall into different classes because of (for example) their differing levels of expertise (as was the case in T-256/04 *Mundipharma AG v OHIM*, where medical professionals would understand a conceptual meaning differently from ordinary end consumers), or because average consumers may perceive more than one meaning (see O/271/13 *THE DOGS* per Ms Anna Carboni, sitting as an Appointed Person, at [35]):

“...The test under section 5(2)(b) on the other hand deals with a completely different question of the impact on the average consumer of the two marks that are under comparison. I do not see any reason why it would be appropriate to restrict that assessment to just one possible meaning of each mark, which happens to support one or other party’s case, **if** the average consumer is likely to perceive others. The common meaning, if there is one, should of course be taken into account, but other likely concepts should not be ignored” (**emphasis added**).

32. Ms Chantrielle took me to a number of decisions in which judges have recognised that average consumers may fall into different categories according to their differing perceptions of the meaning of a particular mark or perhaps their differing levels of knowledge, including O/638/17 *TIFFINS* at [65]-[75] and [85]-[87], O/995/22 *Maison Jeannette* at [23]-[25] and O/448/22 *Invictus* at [45]-[51] and [58]. I accept her submission that these cases clearly evidence an approach which involves the identification of all possible meanings of the mark together with an assessment as to whether any particular meaning or concept would be understood by a significant proportion of average consumers and, if so, how that impacts on the finding of likelihood of confusion. The question at the heart of this appeal, however, is whether this is an approach that the Hearing Officer simply failed to adopt and whether, if he had adopted it, he would inevitably have identified a likelihood of confusion amongst (at least) a significant proportion of average consumers.
33. Before moving away from the law, I should mention two final points.
 - i) First, in his oral submissions, Mr Muir Wood on behalf of SKA pointed out by reference to O/113/14 *MYVIEW* at [42] that the meaning of a mark must be identified in the context of the mark as a whole, a proposition with which I understood Ms Chantrielle to agree, subject to making the point that although it is important that the mark is not artificially dissected, nonetheless its separate elements may still be significant and must be considered (see *Maison Jeanette*). I note in this regard that the Hearing Officer specifically identified this point in his summary of the principles to be applied when carrying out the global assessment of likelihood of confusion at paragraph 20 of the Decision.
 - ii) Second, there was one legal issue on which (at least initially) there appeared to be disagreement between the parties. In his skeleton argument for SKA, Mr Muir Wood appeared to suggest that, when assessing the conceptual similarity of two marks, it is legitimate to have regard to the goods to which the marks relate. Ms Chantrielle pointed out that this was the wrong approach, relying on *Equivalenza* at [70]-[72] and BLO/054/22, a decision of Mr Philip Johnson sitting as the Appointed Person, who said this at [62]: “When assessing the conceptual similarity of two marks, this is usually done without reference to the goods or services in

question (the similarity of goods coming into the assessment at the stage of determining the overall likelihood of confusion)". In his oral submissions, Mr Muir Wood provided a rather more nuanced approach, accepting that his skeleton argument had gone too far, but pointing out that where, as here, the marks which are being compared are concerned with the same goods, such that the average consumer is the same, it is impossible to ignore that fact in considering the conceptual similarity of the marks and, in particular, the perception of the average consumer as to their meaning. Ms Chantrielle did not seek to argue against this approach in her reply and indeed it was consistent with her oral submissions that the court must consider the different possible meanings of a mark from the standpoint of the relevant class, or classes, of the identified average consumer.

Discussion

34. Against that background I now turn to consider Shine's main arguments on the appeal.

Ground 1

35. At the forefront of Ms Chantrielle's case is the proposition that the Hearing Officer failed to carry out a proper analysis as to the available meanings that the word "Master" may have conveyed to the relevant average consumer in the context of the mark **MASTERCHEF/MASTER CHEF**, identifying (as he did) only one meaning. She submits that the Hearing Officer provided no justification for assuming only one meaning. Contrary to the case law, she says that he did not consider whether different average consumers could understand the mark to have different conceptual meanings and/or whether it was the common meaning and/or whether there were other possible meanings. Although she accepts that the Hearing Officer did not fall into error in not setting out the entirety of any analysis he may have carried out, she nonetheless submits that because the Decision does not set out any analysis as to other possible meanings, the correct inference is that the analysis was not in fact done. She submits that if the Hearing Officer had carried out a proper analysis of all the available meanings and the perceptions of the average consumers he would have mentioned it.

36. I reject these submissions for the following reasons:

- i) Whilst it is true that (a) the Decision does not expressly refer to any meanings for the word "Master" beyond the meaning identified by the Hearing Officer in [30] of the Decision; and (b) it also does not explain why the Hearing Officer chose to adopt that particular meaning, I do not consider this alone to be sufficient justification for the inference that I am invited to draw. As I shall come to in a moment, I also reject the suggestion that the Hearing Officer "assumed" only one meaning.
- ii) I remind myself that the Hearing Officer is not required to spell out every element of his decision (as Ms Chantrielle accepts) and that he is an experienced tribunal. I do not consider that, in such circumstances, I can or should (without more) assume that he failed to carry out an important step in the analysis.
- iii) It is common ground that the Hearing Officer accurately set out the key principles to be applied in the global assessment of likelihood of confusion at paragraph [20] of the Decision. He was well aware that he was concerned with the perception of the average consumer, as is clear from his recitation of those principles and the first

sentence of [26] of the Decision in which he expressly observes that “the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details”. At [21] he made findings as to the identity of the average consumer, noting that the average consumer could be either a professional cook or someone with a restaurant business, or a member of the public with a general interest in cooking. These findings are not appealed.

- iv) When it came to considering the meaning of the word “Master”, the Hearing Officer was well aware that the word carried more than one meaning, as is clear from footnote 4 of the Decision in which he expressly refers to the “third meaning” in the Oxford English Dictionary. I consider it to be implicit in this reference that the Hearing Officer looked at the definition of the noun “Master” in the Oxford English Dictionary, noticed that it carried six different meanings and selected the third meaning (“*a skilled practitioner of a particular art or activity*”) as the meaning that the average consumer would be most likely to understand in the context of the mark as a whole. During the course of her oral submissions, Ms Chantrielle accepted that the Hearing Officer must have considered the Oxford English Dictionary.
- v) Furthermore, the Hearing Officer had before him Shine’s Opposition and its written submissions for the hearing, in both of which Shine made submissions to the effect that “the word elements Mister and Master do have the same meaning”. This plainly alluded to a possible meaning of the word “Master” which is not the meaning identified by the Hearing Officer (i.e. it drew the attention of the Hearing Officer to another possible meaning). Given that the word element MISTER in the Contested Mark is “plainly a title for an adult male” (as the Hearing Officer found), this submission can only have been understood to mean that the word element MASTER in the Earlier Marks could also be used as a title. I did not understand Ms Chantrielle to suggest otherwise.
- vi) The Hearing Officer expressly referred to Shine’s written submissions in [12] of the Decision. In circumstances where Shine was not represented at the hearing but had provided the written submissions “in lieu of attendance”, I am not prepared to infer, as Ms Chantrielle invited me to do, that the Hearing Officer might not have read the submissions properly, or might have missed the reference to another meaning. Where the Hearing Officer had no assistance from Shine whatever at the hearing, beyond the content of the written submissions, I consider it to be inconceivable that he would not have considered those submissions (which were only 3 pages in length) in detail. An appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (see *TT Education Ltd v Pie Corbett Consultancy Ltd* (O/017/17) at [52(vi)]) and I see no reason why a similar assumption should not be made in relation to written submissions setting out a party’s case. I can find no good reason in this case to do anything other than assume that the Hearing Officer was well aware, and took account, of Shine’s submissions as to a different possible meaning of the word element MASTER in arriving at his decision on conceptual dissimilarity.
- vii) In all the circumstances, I am not prepared to draw the inference suggested by Ms Chantrielle which (I agree with Mr Muir Wood) would be an unfair inference. The Hearing Officer correctly appreciated that the marks were to be “compared as

wholes” and it was open to him to conclude, as he did, that the average consumer (in the guise he had identified at [21] of the Decision) would have the “third meaning” of MASTER in mind when that word was used in conjunction with the word CHEF. The corollary of that finding is that the average consumer would not perceive any other likely meaning. There is no basis, in my judgment to interfere with that conclusion.

37. In deference to Ms Chantrielle’s arguments, I ought to mention one or two additional matters. Ms Chantrielle submits that had the Hearing Officer carried out the necessary analysis he would have identified three potentially relevant meanings of the noun “Master” in the Oxford English Dictionary (meaning 2: “a man in charge of an organization or group, in particular: a male school teacher: *the games master*; the head of a college or school...”; meaning 3: “a skilled practitioner of a particular art or activity; and meaning 5: “used as a title prefixed to the name of a boy not old enough to be called ‘Mr’: *Master James Wishart*”). Only meaning 5 is relied upon in the Grounds of Appeal, albeit at the hearing Ms Chantrielle sought also to rely on meaning 2¹.
38. Aside from the fact that it was not raised in the Grounds of Appeal, I am not clear how this new reliance on meaning 2 is really consistent with the submission that it is the potential for the word MASTER to be used as a title which renders it conceptually similar to MISTER. I agree with Mr Muir Wood that, even if it would be appropriate at this stage to consider whether the Hearing Officer erred in failing to have regard to meaning 2 (notwithstanding that it is not mentioned in the Grounds of Appeal), such argument would not advance Shine’s case, because meaning 2 is conceptually closer to meaning 3 than it is to meaning 5; specifically meaning 2 does not contemplate a title which would be used as a prefix.
39. In her skeleton argument, Ms Chantrielle’s focus was (necessarily) on the issue of title. She submitted that “The Hearing Officer correctly held that MISTER was plainly a title for an adult male...Had the Hearing Officer taken into account the meaning of MASTER **as the title** of an adult male or boy, it is submitted that he must have concluded that the marks were conceptually similar” (**emphasis added**). The difficulty with this submission is that, as I have said, meaning 2 does not denote a title similar to ‘Mr’; it is only meaning 5 that denotes a title and that is in the context of a boy not old enough to be called ‘Mr’.
40. In my judgment it was plainly open to the Hearing Officer to conclude that the average consumer falling within the categories he had identified in paragraph [21] of the Decision (or a significant proportion of such consumers) would not have understood the word element ‘MASTER’ to refer to a boy not old enough to be called ‘Mr’ (especially when viewed in conjunction with the word element CHEF). I certainly do not consider that I am in a position to determine that this was a distinct and material error of principle.

Ground 2

41. In her skeleton argument Ms Chantrielle submitted that “The Hearing Officer’s assumption of a single meaning **may have flowed** from the finding that MASTER CHEF meant “a top chef”” in paragraph [24] of the Decision. She went on to say that “**It is possible that** the Hearing Officer’s assumption of this meaning **may have been** a result

¹ In her skeleton there was also a suggestion that Shine relied on meaning 1 as set out in the Oxford English Dictionary, namely: “a man who has people working for him, especially servants or slaves”, although this was not pursued at the hearing, not least because it is expressly identified as “chiefly historical”.

of the substantial reputation of the mark MASTERCHEF for the well-known television show, which the Hearing Officer found as a fact in the context of s 5(3) of the Decision at [37]” (**emphasis added**).

42. This rather tentative articulation of Ground 2 does not come close to persuading me that it would be appropriate to infer that the Hearing Officer imported his knowledge of the reputation of the television series “MASTERCHEF” (in respect of which there was evidence in the context of the section 5(3) opposition) into his analysis of the meaning of the word “Master”, a submission that Ms Chantrielle made orally.
43. I asked Ms Chantrielle to identify the basis on which she contends that it would be appropriate for the court to draw such an inference. Essentially her response boils down to the proposition that (i) the inference follows from the fact that the Hearing Officer failed to take account of the additional available meanings of MASTER identified in the Oxford English Dictionary; and (ii) the inference is appropriate because in [24], the Hearing Officer was considering the concept of a master chef (“a top chef”) in the context of goods used in the context of cooking and baking (as he was entitled to do in considering inherent distinctiveness) and that there is nothing to say he did not then import that consideration into his analysis of conceptual similarity – indeed it is to be inferred that he did.
44. Given my findings and reasoning on Ground 1, this appears to me to be unsustainable. The findings in [24] are not themselves challenged and in my judgment there is no proper basis for the inference that I am invited to draw, which assumes an error where there is no positive basis for such assumption. Shine accepts that there is no suggestion in the Decision that the Hearing Officer undertook the conceptual comparison by reference to the goods and services covered by the Earlier Marks and thus no suggestion in the Grounds of Appeal of any error in this regard.
45. Furthermore, I cannot see that there is any reason for me to infer that the Hearing Officer arrived at meaning 3 owing to the conscious or unconscious influence on him of the reputation of the MASTERCHEF television show. That show is not mentioned in [24] and there is nothing whatever in that paragraph to suggest that he has somehow taken it into account in carrying out his later assessment of conceptual dissimilarity.
46. In short, I do not consider there to be any grounds for concluding that the Hearing Officer made a clear and distinct error of principle.

Conclusion

47. It is accepted that if Shine fails to convince the court on Grounds 1 and 2 then the remainder of this appeal will fall away.
48. Accordingly, for the reasons I have identified, the appeal is dismissed. I am extremely grateful to both counsel for their helpful submissions.