

O/851/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003609981

BY CHARLIE SIMPSON-DANIEL

TO REGISTER THE FOLLOWING MARK:

THE LAND OF THE SAMURAI

IN CLASS 30

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600001777

BY RIPON SELECT FOODS LTD.

Background and pleadings

1. On 15 March 2021, Charlie Simpson-Daniel (“the applicant”) applied to register the trade mark shown below and the application was published for opposition purposes on 14 May 2021.

THE LAND OF THE SAMURAI

2. Registration is sought for the following goods:

Class 30 Tortilla snacks; Crispbread snacks; Rice snacks; Cereal snacks; Puffed corn snacks; Rice cake snacks; Cereal based snacks; Cheese curls [snacks]; Cheese balls [snacks]; Fruit cake snacks; Extruded corn snacks; Extruded wheat snacks; Rice-based snack foods; Snack food (Rice-based -); Snacks made from muesli; Snacks manufactured from cereals; Snack food (Cereal-based -); Multigrain-based snack foods; Flour based savory snacks; Corn-based snack foods; Cereal-based snack bars; Snacks manufactured from muesli; Maize based snack products; Wheat-based snack foods; Rice-based snack food; Cereal-based savoury snacks; Extruded snacks containing maize; Cereal-based snack food; Cereal based snack foods; Grain-based snack foods; Corn-based savoury snacks; Snack foods made from wheat; Cereal based prepared snack foods; Snack products made of cereals; Snack foods made of wheat; Puffed cheese balls [corn snacks]; Snack foods made from corn; Cheese flavored puffed corn snacks; Snack foods prepared from maize; Snack foods made from cereals; Snack foods consisting principally of pasta; Snack food products made from rice; Snack food products made from cereals; Cereal snack foods flavoured with cheese; Snack foods made of whole wheat; Snack foods consisting principally of rice; Snack foods consisting principally

of grain; Snack foods consisting principally of confectionery; Snack foods prepared from potato flour; Snack foods consisting principally of bread; Snack food products made from potato flour; Snack food products made from cereal starch; Snack foods consisting principally of extruded cereals; Snack food products made from rice flour; Snack food products made from maize flour; Snack food products made from cereal flour; Snack food products made from soya flour; Snack food products consisting of cereal products; Snack food products made from rusk flour; Flavourings for snack foods [other than essential oils]; Snack foods made from corn and in the form of puffs; Snack foods made from corn and in the form of rings; Snack bars containing a mixture of grains, nuts and dried fruit [confectionery]; Ready to eat savory snack foods made from maize meal formed by extrusion.

3. Ripon Select Foods Ltd. ("the opponent") opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against the following goods in the application:

Class 30 Flour based savoury snacks; Wheat-based snack-foods; Snack food products made from cereal flour; Snack food products made from rusk flour; Snack foods consisting principally of bread; Snack foods consisting principally of grain; Grain-based snack foods; Snack foods made from wheat; Snack foods made of wheat.

4. The opposition is reliant upon the trade mark UK00002118275 below, filed on 11 December 1996, registered on 18 July 1997.

SAMURAI

5. The mark is registered for the following goods on which the opponent relies in its opposition:

Class 30 Bread-crumb coating.

6. The opponent filed Form TM7F, saying that the opposed trade mark is similar to their earlier mark and that the applied for goods are identical or similar to the goods that they are relying on in their opposition. They contend that the applicant's use of the "Trade Marked word "Samurai" is an attempt to utilise the style of appearance ... and texture that we have developed over the last 25 years."
7. The Form TM7F is a notice of "fast track" opposition, which can be used when the opposition is based on sections 5(1) and/or 5(2) of the Act. In this instance, the opposition being based on a mark that had been registered for five years or more on the date that the applicant's mark was filed, the opponent was required to include evidence of use of the mark ("proof of use") as per section 6A of the Act. However, while the applicant in his Form TM8 denied the opponent's claims and argued that the opponent offers only "a descriptor on their website "Samurai breadcrumbs" and no formal branding or visual presentations," he did not request proof of use. Consequently, the opponent can rely on the goods it has identified without having to prove genuine use.
8. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

9. Except where filing proof of use evidence is a prerequisite, the net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it, or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.
10. In this case, neither party sought leave to file evidence in addition to the proof of use evidence that the opponent had been required to file in advance.
11. A hearing was neither requested nor was it considered necessary.
12. Neither party elected to file written submissions.
13. Both parties are representing themselves.

Evidence

14. The opponent filed evidence in the form of exhibits accompanying its TM7F, having answered the questions relating to use. The TM7F (which includes a statement of truth) is signed by A.J. Gordon, the company secretary of the opponent, and is dated 5 June 2021. The exhibits are described below.
15. Exhibit 1 consists of a printout from the opponent’s website, with details of the opponent’s breadcrumb products. Exhibit 2 is a page from the opponent’s “marketing pack”, providing information on the opponent’s “Novel Breadcrumb Range”.
16. While the above evidence does not need to be considered in relation to proof of use, it will be reviewed in the context of enhanced distinctiveness.

DECISION

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

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

(a)...

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

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

18. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.- (1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK) a European Union trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

19. Given its filing date, the trade mark upon which the opponent relies qualifies as an earlier trade mark as defined in section 6(1) of the Act.

Section 5(2)(b) – case law

20. 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.

21. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

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

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

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

Comparison of goods

22. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“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.”

23. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

24. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods (and by extension services). In *Boston Scientific Ltd v Office for Harmonization in the Internal Market* (Trade

Marks and Designs) (OHIM), Case T-325/06, the GC stated that “complementary” means:

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

25. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

While on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

26. The respective goods are listed below:

Opponent's goods	Applicant's goods
<u>Class 30</u> Bread-crumb coating.	<u>Class 30</u> Flour based savoury snacks; Wheat-based snack-foods; Snack food products made from cereal flour; Snack food products made from rusk flour; Snack foods consisting principally of bread; Snack foods consisting principally of grain; Grain-based snack foods; Snack foods made from wheat; Snack foods made of wheat.

27. When comparing the applicant's "Snack foods consisting principally of bread" with the opponent's "Bread-crumb coating", they have something superficially in common in respect of their physical nature in that snack foods consisting principally of bread have bread as a component, while bread crumbs are made from bread. However, the snack foods are made from fully formed bread, whereas bread crumbs are made by grinding up or grating bread. The respective goods' intended purposes differ, such snack foods being intended for the satisfaction of hunger between meals, while bread crumb coating's intended use is as a cooking ingredient with a view to providing a textured covering for foods like meat and fish. The methods of use necessarily differ – the one being eaten with the hands as a fully made up standalone item, the other being used as a cooking ingredient.

28. There are also differences between the goods when considering the user groups. Snack foods are consumed by the general public as a whole, while bread crumb coating is used by amateur cooks, professional chefs, and those involved in the food manufacturing process. The fact that the goods are very different can also be seen when considering their trade channels. Snack foods are widely available, in supermarkets, petrol stations, bakeries

and so on, while bread crumb coating would only be found in the ingredients section of a supermarket or small food shop or be available from outlets that sell such goods in bulk to food manufacturers. Even where both were present in a supermarket, they would be placed in different parts of the shop.

29. Finally, the respective goods are neither in competition, nor are they complementary.

30. Taking the above factors into account, I conclude that the respective goods are dissimilar. The same finding applies to “Flour based savoury snacks”, “Wheat-based snack-foods”, “Snack food products made from cereal flour”, “Snack food products made from rusk flour”, “Snack foods consisting principally of grain”, “Grain-based snack foods”, “Snack foods made from wheat”, and “Snack foods made of wheat”, the shared basis of their various ingredients – such as flour and grain – being even more tenuous as a basis for considering the question of similarity in terms of the goods’ physical nature. Fundamentally, the applicant’s goods are fully formed foodstuffs, while the opponent’s goods are small fragments of bread that function as a cooking ingredient. Accordingly, I find that all the contested goods are dissimilar to the opponent’s goods.

31. As some degree of similarity between the goods is required for there to be a likelihood of confusion¹, the opposition would fail at this point. However, if I am wrong about the level of similarity, the applicant’s goods and those of the opponent are of very low similarity and I therefore go on to consider the similarity of the marks.

The average consumer and the nature of the purchasing act

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

¹ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

33. When considering snack foods and bread crumb coating, the purchasing process of both such foodstuffs would not require much deliberation on the part of the purchasing public, and the costs involved would be low, so I consider that a member of the public buying the contested snack foods or the opponent’s bread crumb coating would only pay a low degree of attention. Even where bread crumb coating was being purchased in bulk by a professional or a manufacturer and there were greater financial considerations and questions as to the quality in play, purchasers would only pay a medium level of attention. Overall, the typical consumer would pay a low to medium level of attention during the purchasing process.

34. The purchasing process would be a predominantly visual one, whether that involved a brief inspection of the goods on the shelves, or a more careful examination of a sample of bread crumb coating with a view to making a bulk purchase. Verbal factors would be minimal.

Comparison of the trade marks

35. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not

proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in 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.”

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

37. The opponent's and the applicant's marks are shown below:

Opponent's trade mark	Applicant's trade mark
SAMURAI	THE LAND OF THE SAMURAI

38. The opponent's figurative mark has the word "SAMURAI" in highly stylised black text rendered as if using oriental calligraphy, but at the same time appearing to show the letters being made up from a series of swords. In that respect, while the word is the element that plays the greatest role in the overall impression, the stylisation of the letters has an important role to play in giving significant emphasis to the word.

39. The applicant's mark consists of the plain words "THE LAND OF THE SAMURAI". There are no other elements that contribute to the overall impression of the mark which lies in the combination of these words.
40. Visually, the opponent's mark consists of a single word "SAMURAI", albeit highly stylised, that same word being the last word in the plain word phrase "THE LAND OF THE SAMURAI". While the final word "SAMURAI" is the longest word in the phrase, being composed of 7 letters, it is only a part of the entire phrase which is 19 letters long. Although from a lexical point of view the main word in the phrase "THE LAND OF SAMURAI" is "SAMURAI" since it tells consumers what "THE LAND OF" is about, from a visual point of view it does not stand out. Furthermore, I take into account that the word "SAMURAI" is placed at the end of the mark and beginnings of marks are, generally, more focused upon. Weighing up the similarities with the differences, I find the marks to be visually similar to a slightly lower than medium degree.
41. Aurally, the marks are "SAM-OO-RYE" and "THE LAND OF THE SAM-OO-RYE", the single word of the opponent's mark and the last word of the applicant's mark being aurally identical. However, overall, they are of medium similarity aurally, the first four words of the applicant's mark being aurally dissimilar to the opponent's mark.
42. A "samurai" is a Japanese warrior and the opponent's mark conveys the concept of a samurai as an individual, the word being reinforced by the stylisation. On the other hand, while the concept of a samurai is present in the applicant's mark, the prior words "THE LAND OF THE ..." result in the concept of a land where samurais live. I find the marks to be of medium similarity conceptually.

Distinctive character of the earlier mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

44. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

45. I start with an assessment of the inherent distinctive character of the earlier mark.

46. The word “SAMURAI” in the opponent’s mark is neither allusive nor suggestive of the goods for which the mark is registered. The stylistic elements of the mark only reinforce the concept conveyed by the word. The word is not highly distinctive in the way that it might be if one was dealing

with an invented word. Consequently, I consider the mark to be inherently distinctive to a medium degree. I bear in mind that the degree of distinctiveness of the earlier mark is only likely to be significant to the extent that it relates to the point of commonality between the marks², namely the word “SAMURAI”, not the stylisation of the letters.

47. The opponent originally provided evidence in the context of proof of use. Although the opponent has made no claim of an enhanced degree of distinctive character acquired through use, that would not prevent me from considering whether the use the opponent has made of the earlier mark has actually enhanced the distinctiveness of the mark to any extent. This is because the assessment of distinctiveness is one of the fundamental factors that needs to be assessed in every case and, as is clear from the case-law, this can come from either the inherent nature of the mark, its use, or indeed a combination of the two.
48. Given the evidence filed, I now consider whether the evidence of the earlier trade mark’s use shows that it has an enhanced degree of distinctive character beyond its inherent distinctive character.
49. The evidence supplied – the website printout and the page from the marketing pack – shows the plain word “Samurai” being used as the name of a product within the opponent’s bread crumb range and not the mark as registered, i.e. with the stylisation. The documents submitted also show use of the name “Ripon Select Foods Ltd” and a logo consisting of the letters “RSF” in blue inside a red diamond.
50. Leaving aside the issue of whether the mark as used is an acceptable variant of the mark as registered, the main problem with the opponent’s evidence is that the word “Samurai” is not being used as a badge of origin, but rather, as a product name for a particular type of bread crumb. This is apparent from the following text, headed “Samurai”: “A light eating Japanese breadcrumb

² See, *Kurt Geiger v A-List Corporate Limited*, BL O-075- 13,

with distinctive needle shaped particles.” Consequently, to the extent that the opponent has used the mark, it has educated consumers to see it as the name of a product, offered by an undertaking associated with the name “Ripon Select Foods Ltd” and the sign RSF.

51. On the basis of the above analysis, I do not consider that the evidence shows the opponent’s mark to be in use. However, if I am wrong, the evidence does not in any event contain a statement as to the market share held by the mark, nor is any information supplied as to marketing expenditure. There is also no information as to where in the UK any sales have been achieved under the mark, the only information as to geographic location being that the opponent has an address in England set out at the bottom of the web page and an email address that ends in .co.uk. Consequently, there is no evidence as to the geographical spread in the UK of the mark’s use.

52. The opponent lists the number of sales for the fiscal years April 2016-March 2017, 17/18, 18/19, 19/20, and 20/21. They use the shorthand “T” which I take to stand for “thousand”, hence the stated figures would be: 470000 (16/17), 422000 (17/18), 354000 (18/19), 414000 (19/20), and 184000 (20/21).

53. Even considering the sales figures, which appear to be significant, the evidence of use does not strike me as indicative of a level that would lead to the capacity of the mark, measured from the perspective of the average consumer, to more greatly identify the goods for which they have been registered as coming from a particular undertaking, beyond their inherent capability to do so.

54. Overall, I do not find that the evidence shows use of the mark such that the level of distinctiveness can be raised above the findings that I have made for the mark’s inherent distinctive character, that of a medium degree.

Likelihood of confusion

55. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

56. When compared with the applicant's mark, I have found the earlier mark to be of slightly lower than medium similarity visually, of medium similarity aurally, and of medium similarity conceptually. I have found the respective goods to be dissimilar, although if I am wrong, they are of very low similarity. The typical consumer will pay a low to medium level of attention during the purchasing process and that process would be a predominantly visual one.

57. I consider there to be sufficient differences between the opponent's mark and the applicant's mark to avoid them being mistakenly recalled as each other. While the word that is common to the two marks is longer than the preceding words in the applicant's mark, those additional four words are clearly noticeable. There are also stylistic differences between the embellished "SAMURAI" in the opponent's mark and the plain "SAMURAI" in the applicant's mark. There is therefore no likelihood of direct confusion.

58. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case 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 recognised 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.”

59. The typical consumer would recognise the earlier mark as different from the applicant’s mark. The question remains whether they would consider the later mark to be another brand of the owner of the earlier mark, or that of a related undertaking, the marks having the word “SAMURAI” in common.

60. Given the considerable distance between the goods – the degree of similarity being very low – and the differences between the marks, I find that there is no likelihood of indirect confusion. The typical consumer would put down the presence of the word “SAMURAI” in both marks to coincidence rather than economic connection.

CONCLUSION

61. The opposition has failed. The application will proceed in full to registration, subject to appeal.

COSTS

62. The applicant has been successful in this case. He is unrepresented, but no Cost Pro Forma has been received, nor have any official fees been incurred. As such, I make no award as to costs.

Dated this 18th day of November 2021

JOHN WILLIAMS
For the Registrar