



Neutral Citation Number: [2024] EWHC 2311 (Ch)

Case No: CH-2024-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
ON APPEAL FROM THE UK INTELLECTUAL PROPERTY OFFICE

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

Date: 9 September 2024

Before :

TOM MITCHESON KC
(sitting as a Deputy Judge of the High Court)

Between :

FOUNDATION FOR THE PROTECTION OF THE
TRADITIONAL CHEESE OF CYPRUS NAMED
HALLOUMI

Appellant

- and -

FONTANA FOOD AB

Respondent

Simon Malynicz KC (instructed by Clifford Chance) for the Appellant
Ian Bartlett (instructed by Beck Greener) for the Respondent

Hearing date: 23 July 2024

APPROVED JUDGMENT

The Deputy Judge:

1. This is an appeal against a decision made on behalf of the Registrar of Trade Marks in trade mark opposition proceedings. By decision dated 20 December 2023 (“the Decision”), Hearing Officer Heather Harrison dismissed oppositions brought by the Appellant, whom I shall refer to as “the Foundation”, against two applications made in the name of the Respondent, Fontana Food AB “Fontana”. Fontana is a Swedish company founded by Cypriot expatriates who claim to have been the first to introduce halloumi cheese into the Swedish market.
2. The contested applications are as follows:
 - i) Trade mark number 3691867 for the word “GRILLOUMI”, filed in the UK on 8 September 2021 in Class 43: Services for providing food and drink; Coffee-shop services; Restaurants.
 - ii) Trade mark number 3693059 for the word “GRILLOUMAKI”, filed in the UK on 10 September 2021 in Class 29: Meat, fish, poultry and game; Meat extracts; Preserved, dried and cooked fruits and vegetables; Jellies, jams, compotes; Eggs, milk and milk products; Edible oils and fats; and Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, coffee substitutes; Flour and preparations made from cereals, bread, pastry and confectionery, ices, honey, treacle; Yeast, baking-powder; Salt, mustard; Vinegar, sauces (condiments); Spices; Ice.
3. As will be apparent from the full title of the Foundation, it exists as an association of producers dedicated to the promotion of halloumi, the traditional cheese of Cyprus. It is the owner of a collective mark registered in the UK as of 14 July 2000 for the word “HALLOUMI” in class 29 for “cheese”.
4. A collective mark is a specific type of trade mark which indicates that the goods or services bearing the mark originate from members of a trade association, rather than just one trader. A collective mark is to be distinguished from a geographical indication or a protected designation of origin which are intended to protect the name of a product which comes from a specific region or follows a particular traditional production process.

5. Indeed, in the present case it appears that membership of the Foundation is not compulsory for producers of halloumi in Cyprus and so halloumi can be legitimately made and marketed by non-members. The purpose of the trade mark is instead to designate the products of those producers who are members of the Foundation.
6. A related and equally important point to bear in mind at the outset is that the word halloumi is also used descriptively to describe the traditional cheese made in Cyprus, whether by Foundation members or not. Indeed, as will become apparent, this is its overwhelming use. Untangling the generic use from the trade mark use is an important aspect of this appeal.
7. The oppositions were brought by the Foundation under ss.5(2)(b) and 5(3) of the Trade Marks Act 1994 and based on the Foundation's earlier HALLOUMI mark. The Foundation was put to proof of its use of its mark and this is the subject of a Respondent's Notice brought by Fontana.
8. There is a long history of litigation between the Foundation and Fontana and I was referred to various previous decisions, including the decision of Marcus Smith J. in *Foundation v Babel Sajt* [2020] EWHC 2858 (Ch). I was also told that Fontana has a subsisting UK registration for GRILLOUMI in class 29 for cheese which is not presently the subject of invalidation proceedings. I do not consider the status of other marks or the outcome of other proceedings to be of primary relevance to the issues I have to decide, namely the correctness or otherwise of the Decision of the Hearing Officer, but I will refer to them in context below as appropriate.

Standard of Appeal

9. The standard of appeal in appeals from the Registry is well established. The Foundation referred me to the observations of Daniel Alexander QC sitting as the Appointed Person in *TT Education Ltd v Pie Corbett Consultancy Ltd* (O/017/17) at [14] to [52], as approved by Arnold J (as he then was) in *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch). Fontana referred me to the observations of Joanna Smith J. in *Axogen Corporation v. Aviv Scientific Limited* [2022] EWHC 95 (Ch) at [24]. I have born these principles in mind.

10. The Supreme Court has recently issued guidance to similar effect in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, where Lords Briggs and Kitchin explained at [49]-[50]:

“... on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge’s treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

On the other hand, it is equally clear that, for the decision to be “wrong” under CPR 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.”

11. I also bear in mind the observations of Iain Purvis QC sitting as the Appointed Person in *ROCHESTER TRADE MARK* BL 0/049/17 at [33]:

“... the reluctance of the Appointed Person to interfere with a decision of a Hearing Officer on likelihood of confusion is quite high for at least the following reasons:

- i) The decision involves the consideration of a large number of factors, whose relative weight is not laid down by law but is a matter of judgment for the tribunal on the particular facts of each case.
- ii) The legal test ‘likely to cause confusion amongst the average consumer’ is inherently imprecise, not least because the average consumer is not a real person.
- iii) The Hearing Officer is an experienced and well-trained tribunal, who deals with far more cases on a day-to-day basis than the Appellate tribunal.
- iv) The legal test involves a prediction as to how the public might react to the presence of two trade marks in ordinary use in trade. Any wise person who has practised in this field will have come to recognize that it is often very difficult to make such a prediction with confidence. ... Any sensible Appellate tribunal will therefore apply a healthy degree of self-doubt to its own opinion on the result of the legal test in any particular case.”

12. The Foundation’s grounds of appeal can be broken down as follows. Starting with s.5(2), in relation to the GRILLOUMI application, it criticises the comparison of goods and services made by the Hearing Officer. Further, it says the Hearing Officer

erred in her approach to the assessment of indirect confusion. Additionally, it says that she should have taken into account the intention of Fontana in seeking to have the marks registered, and that GRILLOUMI would call to mind HALLOUMI.

13. As for GRILLOUMAKI, the focus was on the comparison of marks and the failure to place weight on the fact that “AKI” would be seen as signifying a diminutive. There were also criticisms of the comparison of goods, although these would only be relevant if the Hearing Officer was wrong in her primary assessment, given that she had found that at least some of the goods were identical.
14. The s.5(3) complaints followed on from the s.5(2) criticisms and focussed on the alleged failure by the Hearing Officer to assess unfair advantage in relation to both applications.
15. Finally, by Respondent’s Notice Fontana challenged the finding of the Hearing Officer that there had been genuine use in the relevant periods of the HALLOUMI mark by the Foundation. I will return to that, to the extent necessary, at the end.

The Appeal under s.5(2) - GRILLOUMI

16. There was no criticism of the legal principles to be applied under s.5(2), which the Hearing Officer set out as follows at §43, and with which I concur:

(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 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 will wrongly believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

17. The Hearing Officer then characterised the nature of the average consumer and concluded that it encompassed both trade consumers and members of the general public. She held that there would be a medium level of attention given to the purchase of the goods for which HALLOUMI is registered and the services applied for under the GRILLOUMI mark. Again, none of this is criticised on appeal.

18. The Hearing Officer then turned to the comparison of goods and services upon which the first ground of appeal is founded. She determined that “Services for providing food and drink; Coffee-shop services; Restaurants” were dissimilar to “cheese” alternatively that there was a low degree of similarity between them on account of shared channels of trade and complementarity (§61). Her reasoning was as follows:

61. “Services for providing food and drink” and “restaurants” differ in nature and purpose from cheese. Methods of use are also different and although the users overlap, this is due to the users being the general public and it is not a significant point of coincidence. I accept that cheese may be an ingredient in meals served in restaurants

(encompassed by “services for providing food and drink”). I also recognise that cheese may be provided without further processing in restaurants, for example as part of a cheeseboard. The General Court (“GC”) reversed a finding of no similarity between the above services and cheese, holding that cheese is “necessarily used in the serving of food and drink” and therefore that the goods and services are complementary. It added that cheese is to be found both as an ingredient in prepared dishes and that “cheese, without being processed as an ingredient, may be sold as it is to consumers, in particular in restaurants in which the activity is not confined to the preparation and serving of cooked dishes, but also consists of selling food which is intended to be consumed away from the place in which it is sold” (Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO, T-555/19, EU:T:2021:204 at [45]). There is no evidence that it is typical for cheese to be sold for consumption off the premises by restaurants or other food service providers in the UK. Nor is there any evidence that cheese is important to restaurants in the UK such as would give rise to complementarity. In any event, I do not consider that the average consumer would assume that the service provider was also responsible for the cheese: although there was mention of fondue restaurants, it is beyond my experience as an average consumer that either fondue restaurants or restaurants known for making their own cheese are common in the UK, and there is no evidence to support the premise. Although one could obtain a cheese course from a restaurant, a real competitive choice between the purchase of cheese as a good and the use of restaurant services strikes me as unlikely. These goods and services are not similar. If that is not right, there is a low degree of similarity on account of shared channels of trade and complementarity.

62. As for “coffee-shop services”, I bear in mind that the GC held in the same decision that these services are also complementary to cheese. I accept that it is commonplace for coffee shops to offer snacks and light meals such as sandwiches and jacket potatoes, which may include cheese. However, I am doubtful that, in the UK market, cheese would be perceived as important for coffee shop services: cheese is, if anything, likely to be viewed as one ingredient among many in a finished meal or snack. I do not think that these goods and services are similar. If that is not right, they are similar only to a low degree.

19. The Foundation attacked this finding with vigour at the hearing before me. First, the example of a mobile restaurant van was cited to me, serving grilled halloumi cheese products. It was submitted that in those circumstances the possibility of a connection between the origin of the services for providing food and drink and the origin of the cheese product itself could not be denied. Thus, it was said, the Hearing Officer was wrong in her primary finding that the goods and services were dissimilar.

20. I agree with this submission. Whilst the Hearing Officer was no doubt right to conclude that it is not usually the case that the providers of restaurant services are also responsible for providing the goods in the restaurant, and in particular cheese, this possibility cannot be ruled out completely. The Foundation cited examples of undertakings such as Starbucks, Pizza Express and Nando's selling food products as well as providing coffee shop or restaurant services. I also consider that smaller chains of local or individual restaurants might also separately sell food products which originate from the same source – think of farm shops or undertakings focussing on organic or locally sourced produce.
21. However, I consider that this submission only goes so far. I agree with the Hearing Officer that consumers are very unlikely to go to a local restaurant in lieu of the supermarket when they fancy some cheese. Nor do I think that the average consumer would assume generally that any cheese served in a restaurant either as part of a main dish or even on its own at the end of a meal had originated from the same undertaking as the restaurant services. The cross-over necessary for restaurants or coffee shops (or food vans) to sell their own cheese is expected to be extremely limited in the mind of the average consumer and the complementarity between cheese and the class 43 services applied for by Fontana will be equally small.
22. I therefore consider the Hearing Officer was right in her secondary position that there is a low degree of similarity on account of shared channels of trade and complementarity. Given the relatively rare circumstances in which such cross-over is likely to occur and the differences which otherwise exist between cheese goods and restaurant services (as the Hearing Officer pointed out), I do not consider that there is any basis to find that she fell into error and should have found a greater degree of similarity between goods and services, as was urged on me by the Foundation.
23. For what it is worth, I consider that this is consistent with the decisions of the General Court dealing with the same question of similarity of goods and services, also referred to by the Hearing Officer at §52. Thus, in the Judgment of the General Court dated 21 April 2021 in Case T555/19 between the present parties and relating to the equivalent GRILLOUMI mark as is in issue in the present case, the Court held (overturning the Board of Appeal of EUIPO which had found dissimilarity) (emphasis added):

44 In that regard, it must be borne in mind that goods and services are complementary where there is a close connection between them, in the sense that one is indispensable or important for the use of the other, with the result that consumers may think that the same undertaking is responsible for manufacturing those goods or for providing those services (see, to that effect, judgment of 4 February 2013, *Hartmann v OHIM – Protecsom (DIGNITUDE)*, T-504/11, not published, EU:T:2013:57, paragraph 44 and the case-law cited).

45 As is apparent from the case-law of the Court, it must be stated that the goods in Class 29, inter alia, cheese, are necessarily used in the serving of food and drink, with the result that those goods and those services are complementary. First, cheese may be offered to the clientele of many restaurants, or even of coffee shops, by being incorporated as an ingredient in dishes that are intended to be sold on the premises or to be taken away. Secondly, cheese, without being processed as an ingredient, may be sold as it is to consumers, in particular in restaurants in which the activity is not confined to the preparation and serving of cooked dishes, but also consists of selling food which is intended to be consumed away from the place in which it is sold. Such goods are therefore used in and offered by means of services for providing food and drink, restaurant services or coffee-shop services. Those goods are consequently closely connected with those services (see, to that effect, judgments of 13 April 2011, *Bodegas y Viñedos Puerta de Labastida v OHIM – Unión de Cosecheros de Labastida (PUERTA DE LABASTIDA)*, T-345/09, not published, EU:T:2011:173, paragraph 52, and of 18 February 2016, *HARRY'S BAR*, T-711/13 and T-716/13, not published, EU:T:2016:82, paragraph 59 and the case-law cited).

...

50 In the light of those considerations, it must be held, contrary to what the Board of Appeal found, that the complementary connection between cheese and services for providing food and drink, restaurant services and coffee-shop services must lead to the finding that **there is a certain degree of similarity between, on the one hand, the 'services for providing food and drink; coffee-shop services; restaurants' in Class 43 covered by the mark applied for and, on the other hand, the 'cheese' in Class 29 covered by the earlier mark.**

24. See also the later General Court decision of 8 December 2021 in case T595/19 between the present parties but in relation to the mark GRILLOUMI BURGER in classes 29, 30 and 43, where the Court, after using identical wording to that found in paragraphs 44 and 45 quoted above, stated (emphasis added):

57 In the light of those considerations, it must be held, contrary to what the Board of Appeal found, that the complementarity between

cheese and services for providing food and drink, restaurant services and coffee-shop services must lead to the finding that there is a certain degree of similarity between, on the one hand, the ‘services for providing food and drink; coffee-shop services; restaurants’ in Class 43 covered by the mark applied for and, on the other, the ‘cheese’ in Class 29 covered by the earlier mark. **However, that degree of similarity must be classified as weak, in so far as, first, the nature of the services and goods at issue is obviously different, because the former are fungible and the latter are not** (see, to that effect, judgment of 24 January 2019, *Brown Street Holdings v EUIPO – Enesan (FIGHT LIFE)*, T-800/17, not published, EU:T:2019:31, paragraph 25 and the case-law cited), **and, second, ‘services for providing food and drink; coffee-shop services; restaurants’ in Class 43 covered by the mark applied for can be complementary to a wide range of food products, of which cheese forms only a part.**

25. Having dealt with the similarity of goods and services, the Hearing Officer went on to consider the distinctiveness of the Foundation’s HALLOUMI collective mark. She concluded in §68 that as far as the general public was concerned it was only weakly distinctive and that there was no enhanced distinctiveness established through use. In §69 she concluded that for trade buyers it was distinctive to a medium degree by 2020. Neither of these conclusions was challenged on appeal.
26. She then proceeded to compare the marks. For HALLOUMI and GRILLOUMI she considered that the marks were visually and aurally similar to a medium degree. Conceptually she held that some consumers would perceive the combination of GRILL and HALLOUMI but others would not and would only perceive GRILL.
27. Finally, she turned to the likelihood of confusion. On her primary finding of dissimilarity of goods/services she held that there was no likelihood of confusion (§84). However, she went on to consider the position if, as I have found, the goods and services are similar to a low degree. She concluded as follows in §85:

85. In case I am held to be wrong on appeal, I have considered whether the opposition against the “GRILLOUMI” mark would succeed on the alternative basis that the goods and services are similar to a low degree. My conclusion is that it would not. There is a good degree of conceptual overlap for those consumers who perceive “GRILLOUMI” as meaning “grilled halloumi” or “halloumi for grilling”, and the marks are visually and aurally similar to a medium degree. The common average consumer is the general public, who will pay a medium degree of attention and for whom the earlier mark does not have an enhanced distinctive character. However, I do not think that, in view of the limited overlap between the goods and services, there is a likelihood of

confusion, whether direct or indirect. The differences between the marks are sufficient that there is no risk that the marks will be mistaken for one another. There is, in my view, no reason why the average consumer would believe that the members of the opponent's association who use the earlier mark to indicate the cheese produced by them would have adopted, or be associated with the use of, a perceptibly different mark for the services at issue. The change from "HALLOUMI" to "GRILLOUMI" is not a logical evolution of a trade mark which would cause the average consumer to believe that the marks were used by the same or connected undertakings. Even were the trade buyer of cheeses to use the food services in class 43, they are unlikely to believe that the contested mark, given the differences between that mark and "HALLOUMI", indicates that the class 43 services are provided by or as the result of an economic connection with the opponent or its members. The opposition under s. 5(2)(b) against the "GRILLOUMI" mark is dismissed.

28. Counsel for the Foundation criticised this finding in a number of ways. First, it was said that having come to the primary conclusion that there was no confusion because of dissimilarity, it was impossible for the Hearing Officer to reach a fair conclusion on an alternative basis. I reject this contention. Decision makers are often asked to reach conclusions on alternative hypotheses because cases may be put on alternative bases and the English system requires all relevant issues to be determined at one level before proceeding to appeal. If any such alternative conclusion was automatically deemed invalid just because the primary conclusion was wrong, the system would soon break down.
29. I accept that in some instances it may be difficult for a decision maker to reach a valid secondary conclusion because of inconsistencies arising out of the (wrong) primary findings, but I do not think that applies in the present case. What is important is to analyse the reasoning of the Hearing Officer and to see if it stands up on its own.
30. As to this the Foundation made two further criticisms. First, it was said that the Hearing Officer should have taken into account the intentions of Fontana, which were, it was said, deliberately to allude to HALLOUMI in choosing the GRILLOUMI mark.
31. I reject the relevance of intention to any analysis under s.5(2), which requires an entirely objective approach. A party may intend that a mark applied for is not confusingly similar, but the mark may nevertheless be successfully opposed. Equally a party may choose a sign in the hope of creating a likelihood of confusion, but fail – in which case under s.5(2) the mark should be allowed to proceed to registration. As

Jacob LJ was fond of saying, there is no tort of non-infringement, and a party may sail as close to the wind as they can as long as they remain on the right side of the line. Whilst intention may be a relevant factor under s.5(3) or for passing off, it is not under s.5(2).

32. More significantly, the Foundation said that the Hearing Officer did not properly consider the likelihood of indirect confusion. It was said that given the obvious suggestion promoted by the portmanteau term GRILLOUMI, she should have held that there was at least a likelihood of indirect confusion arising.
33. I have found this the most difficult point in the case. But after careful consideration I have come to the conclusion that the Hearing Officer was right to reject the likelihood of indirect confusion too. My analysis is as follows.
34. First, it is important to recognise the trap for the unwary in the present case (into which I have at times been tempted to fall). The trap arises because of the very widespread use of “halloumi” as a descriptive term to refer simply to the type of cheese it describes, not as a term in the trade mark sense to describe cheese coming from a member of the Foundation. The relevant test under s.5(2) is not to ask whether the use of GRILLOUMI calls to mind halloumi cheese per se (because this is the descriptive use), but whether because of the use of GRILLOUMI there is a “*risk that the public might believe that the goods or services covered by the earlier trade mark and those covered by the trade mark applied for all originate from members of the association which is the proprietor of the earlier trade mark...*” See the passage from §64 of *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO*, C-766/18P, EU:C:2020:170 cited by the Hearing Officer at §83.
35. It is clear from this citation that the Hearing Officer was focussing on the correct analysis when she came to apply the global test. This is supported by her observation as to how weakly distinctive the mark of the Foundation was, in spite of the very considerable sales figures for halloumi cheese in the UK. See her express finding in §68 (with which I agree) “*I do not think that the member of the public encountering the word “HALLOUMI” on packaging for cheese would by the relevant dates have gained any appreciation that “HALLOUMI” is a collective trade mark*”.

36. Indeed, this is the fundamental problem facing the Foundation and highlights the importance of disentangling the descriptive meaning of halloumi (which is what members of the public will overwhelmingly understand when seeing either HALLOUMI or GRILLOUMI) and its collective trade mark use, which is what is deserving of protection.
37. Moreover, although the categories of indirect confusion set out by Mr Iain Purvis QC in his well-known decision *LA Sugar Limited v Back Beat Inc.*, BL O/375/10 are not closed, I do not consider that the Hearing Officer erred in her analysis of indirect confusion in the present case. I consider that she was entitled to come to the conclusion that she did.
38. As Mr Purvis explained, the difference between direct confusion and indirect confusion is that whilst the former involves no process of reasoning – it is a simply a matter of mistaking one mark for another – the latter occurs where the consumer has actually recognized that the later mark is different from the earlier mark. What follows is a mental process of some kind which links the later mark to the earlier mark in a way which is sufficient to conclude that the later mark is another brand of the owner of the earlier mark. Of the examples which Mr Purvis went on to give (strikingly distinctive common element, addition of non-distinctive element, change of element) it seems to me that the last of these comes the closest to the present case – changing HAL to GRILL. However, in this analysis it is again necessary to disregard the descriptive elements of both marks.
39. Further, as Arnold LJ went on to emphasise in *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207 (and as the Hearing Officer recognised at §82) there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion. I think the Hearing Officer was correct to conclude that there was no such basis in the present case. Although GRILLOUMI may call to mind halloumi in the descriptive sense, any link to HALLOUMI in the trade mark sense is just too weak to conclude that the services being offered under the former are provided by a member of the Foundation. This is the case whether the consumer is a member of the general public (to whom HALLOUMI is weakly distinctive) or the trade (where it is more distinctive but in relation to which more care would be exercised, even for restaurant services).

40. Further, I do not consider that there is any inconsistency with the Hearing Officer's finding under s.5(3) that GRILLOUMI is likely to bring HALLOUMI to mind (§103). Bringing another mark to mind is insufficient for a finding of likelihood of indirect confusion. As the Hearing Officer pointed out, the analysis needs to go further than this and result in consumers believing that members of the Foundation are offering restaurant services under an extension of the HALLOUMI mark. As I have said, I think she was entitled to find that they would not.
41. Again, I take some comfort in this from the fact that Board of Appeal in EUIPO and the General Court have come to the same conclusion for essentially the same reasons in the parallel EU case. At the very least, it confirms that the conclusion of the Hearing Officer was not one which no other reasonable tribunal could reach. See the decision of the General Court T-168/22 dated 3 May 2023 which confirmed the decision of the Fifth Board of Appeal (to whom the case was reassigned following decision T555/19 to which I have referred above). I also note that the General Court was at pains to emphasise, as I have, the importance of disentangling the descriptive use of halloumi from any relevant trade mark use. See e.g. §§38-46 of that Decision.
42. For all these reasons I reject the s.5(2) GRILLOUMI appeal.

The Appeal under s.5(2) - GRILLOUMAKI

43. I now turn to the appeal in relation to the GRILLOUMAKI mark. Although it was said that the Hearing Officer again erred in relation to the assessment of similarity of goods, given that she held that at least some of the goods were identical, I will deal with the points on comparison of marks first.
44. As to this, the Hearing Officer found that the marks were visually similar to a fairly low degree, aurally similar to a low degree and conceptually dissimilar alternatively conceptually neutral.
45. The Foundation criticised this finding on the basis that the Hearing Officer should have accepted that (M)AKI would be seen as a diminutive by the average consumer and therefore there would be a much higher degree of conceptual similarity between the marks. The Hearing Officer had held in §80 that there was no evidence to support

that contention and that it was not something in respect of which judicial notice could be taken.

46. The Foundation pointed to two references in the papers which it said supported the “diminutive” submission. First, in the TM7, it was submitted:

"The variation of the first syllable to include "GRI-" results in the opposed mark being an allusion to a common method of preparation of cheese under the Earlier Mark "HALLOUMI", namely grilling. For those members of the relevant public who speak Greek, including the significant Cypriot diaspora community (around 60,000 Cypriot- born individuals live in the UK) "-AKI" will be understood as a diminutive. "GRILLOUMAKI" is therefore a basic derivation from the Earlier Mark, "HALLOUMI".

47. I was also referred to the evidence proper, and the Witness Statement of Marios Panayides dated 14 July 2022 which stated at paragraph 39:

"The UK is the largest export market for "HALLOUMI" cheese. In 2021, Foundation Members exported 18,052,765 kg of "HALLOUMI" cheese to the UK, to the value of EUR 120,773,069 (see Exhibit "MP7"). Notably the UK also has a large Cypriot and Greek-speaking population. Figures from the ONS indicate that in 2016 there were 62,000 Greeks living in the UK and in 2020 there were 14,000 Cypriots living in the UK. Furthermore, the High Commission of Cyprus in the UK estimates the number of British Cypriots to be around 270,000."

48. Neither of these pieces of “evidence” go far enough to support the contention that the Foundation wishes to make, namely that the Greek language is understood by a sufficiently large proportion of average consumers that AKI could be ignored in the comparison between the marks. In particular, even if the material in the TM7 was enough to establish that AKI designates a diminutive in the Greek language, there is insufficient evidence to demonstrate that the average consumer would understand this. I therefore reject the criticism of the Hearing Officer in relation to her comparison of the marks.
49. It follows that I also find there is no basis to criticise the Hearing Officer’s overall conclusion that there was no likelihood of direct or indirect confusion between HALLOUMI and GRILLOUMAKI, even for identical goods (§86). Indeed, I agree with it, for the reasons she gave. The marks are just too different. As a result, the attempt by the Foundation to criticise the Hearing Officer’s analysis of similarity of

goods goes nowhere and can make no difference to the overall conclusion of lack of likelihood of confusion. For what it is worth I would have rejected the criticisms in any event. The Foundation's main submission – that a consumer would consider that fruit and cheese served on the same plate came from the same *commercial* source (regardless of *production* source) and would therefore be thought of as similar, is an artificial way of analysing this issue.

The Appeal under s.5(3)

50. I turn now to the s.5(3) case. I can deal with this much more briefly.
51. The Hearing Officer rejected the opposition under this heading as far as it related to the general public based on her finding (referred to above) that HALLOUMI had no reputation among the general public as a collective trade mark. I think she was absolutely right to do so. The evidence went nowhere near establishing sufficient reputation for a s.5(3) case to get off the ground in this respect.
52. It is right that the Hearing Officer found that there was a small to reasonable reputation amongst trade consumers at 2016/2020 (§93). At the hearing before me Counsel for the Foundation pressed the case on unfair advantage (as opposed to dilution). He submitted that the Hearing Officer should have taken into account the stated intention of Fontana to bring halloumi cheese to Sweden, then moving to use of the GRILLOUMI mark alongside continued references to halloumi.
53. Even accepting the Foundation's characterisation of the evidence, there are a number of problems with the arguments based on it. First, it ignores the elephant in the room that halloumi is overwhelmingly used descriptively for the reasons already discussed. Fontana cannot be criticised for that. Second, it focusses on the use of GRILLOUMI for cheese, when this is not the correct categorisation of goods/services for the purposes of the present case. Third, it focusses mainly on the general public (irrelevant under s.5(3)) and not the trade customers who will have a much more sophisticated understanding of the market.
54. For these reasons I do not think that the Hearing Officer fell into error or that her conclusions on s.5(3) for either GRILLOUMI or GRILLOUMAKI should be interfered with. I do not think there is basis to accept that Fontana deliberately chose

to use GRILLOUMI to take advantage of the Foundation's reputation in the collective mark HALLOUMI (as opposed to because halloumi is descriptive of a type of cheese). The Hearing Officer was therefore entitled to find in §112 that "*bearing in mind the differences between the goods and services, the reputation and distinctiveness of the collective mark are insufficiently strong to give rise to an unfair advantage of the type identified by the opponent.*"

Respondent's Notice

55. Given my findings above, there is strictly no need for me to deal with Fontana's Respondent's Notice, which was directed at proof of use of the HALLOUMI marks. Nevertheless, I provide my views in brief.
56. The relevant dates for proof of use are 26 October 2011 to 25 October 2016 for the "GRILLOUMI" mark and 12 December 2015 to 11 December 2020 for the "GRILLOUMAKI" mark.
57. At §31 the Hearing Officer quoted from the CJEU in *Der Grüne Punkt – Duales System Deutschland GmbH v EUIPO*, C-143/19P, EU:C:2019:1076. See in particular:

57 It follows that an EU collective mark is put to genuine use where it is used in accordance with its essential function, which is to distinguish the goods or services of members of the association which is the proprietor of the mark from those of other undertakings, in order to create or preserve an outlet for those goods or services.

58 More specifically, such a mark is used in accordance with its essential function from the moment when it enables the consumer to understand that the goods or services covered originate from undertakings which are affiliated with the association, the proprietor of the mark, and to thereby distinguish those goods or services from those originating from undertakings which are not affiliated."

58. She then summarised the evidence in §§34-36. In short, notwithstanding the high levels of sales of halloumi cheese in the UK during the relevant period, marketing spend by the Foundation (mainly at trade exhibitions) was modest. Moreover, the content of such marketing material, and whether it promoted membership of the Foundation or merely the characteristics of halloumi cheese, was less clear. However, there was evidence of advertisements in two issues of Eleftheria newspaper dated March 2015 about the International Food & Drink Event to be held at the ExCel

London that month mentioning that “Halloumi the traditional registered cheese of Cyprus” will be exhibited.

59. Further, the Hearing Officer recorded that there were five examples of promotional material dated within the relevant periods: one from November 2013, two from 2017 (August and November) and two from 2020 (October and November). Four appeared in Speciality Food Magazine and one in The Grocer. Much of the content is the same or similar. They included statements such as “Halloumi cheese is now a firm favourite of UK buyers” and “Halloumi can be eaten raw, grilled, fried or baked [...] this cheese shows great versatility”. There are three references to “HALLOUMI” being registered as a collective trade mark, though none specifies correctly that this means that only members of the association may use it, and one to unspecified trade mark registration.
60. There was also a brochure in evidence of which 500 copies were distributed at trade shows and similar events in 2016 and 2017. It appears that 2,000 copies of an earlier version (not in evidence) were distributed in 2009. The brochure states that “Halloumi” is registered as a collective mark and that the mark “is applied to products produced only in the Republic of Cyprus using raw materials and methods of production unique to the country”.
61. As will be apparent, the Hearing Officer went on to find that there had been genuine use of the marks. Her reasoning is contained in §38. Fontana criticised the following sentence in that paragraph where she said “*However, where the owner of the trade mark has applied the mark, or allowed it to be applied, to the goods for which the mark is registered, and that mark must be treated as distinctive by virtue of its registration, it seems to me that that must be held to be genuine use of the mark.*”
62. I agree that this sentence is not terribly well expressed. Counsel for the Foundation acknowledged that the Hearing Officer cannot have meant that any use is deemed to be genuine use just because the mark is registered and therefore assumed to be distinctive. This would be contrary to her earlier citation from *Der Grüne Punkt*.
63. Nevertheless it is tolerably clear from the evidence that the Hearing Officer did refer to that she considered that there had been at least some genuine use by the Foundation of the HALLOUMI mark as a collective mark. I have to say that the evidence is thin

in the extreme, but I am satisfied that was some material before the Hearing Officer which was sufficient to justify such a finding and so she was entitled to come to the conclusion she did. If it had arisen, I would therefore have dismissed the Respondent's Notice too.

Conclusion

64. In conclusion, I reject the appeals and agree with the Hearing Officer that Fontana's marks should proceed to registration.
65. I will hear the parties as to costs and any consequential matters, preferably in writing, if they cannot otherwise be agreed.