

O-236-17


**TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NO 3188003
BY NOW CLICK 2 EAT LIMITED
TO REGISTER**



**AS A TRADEMARK
IN CLASS 43
AND OPPOSITION THERETO (UNDER NO. 408132)
BY
VIKAS KUNNURE**

BACKGROUND AND PLEADINGS

1. On 27 September 2016, Now Click 2 Eat Limited ('the applicant') applied to register the following:

<p>TM no. 3188003</p> 	<p>Services applied for:</p> <p>Class 43 - Services for providing food and drink; restaurants, takeaways fast food services, bar and catering services; booking and reservation services for restaurants; Catering services for parties. Catering services for the provision of food; Catering services for the provision of food and drink; Consultancy services in the field of food and drink catering services; Consultancy services relating to food preparation; Corporate hospitality (provision of food and drink); Fast food restaurant services; Food and drink catering for banquets; Food and drink catering for cocktail parties; Food and drink catering for institutions; Food cooking services; Outside catering services; Take-away food services; Hospitality services [food and drink]; restaurants catering services; bars; Night club services [provision of food]; Organisation of catering for birthday parties; Outside catering services; Preparation and provision of food and drink for immediate consumption;</p>
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	Preparation of food and beverages; Providing food and drink catering services for fair and exhibition facilities; Providing food and drink for guests in restaurants; Providing food and drink for guests; Take-away fast food services for providing food, fast food and drink services; providing online website services for Takeaways restaurants; providing platform to place the menu for the restaurants takeaways to orders for food and drink online; food ordering and restaurant booking services; operating restaurant and take away fast food services.
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2. The trademark was published on 21 October 2016 and opposed by Vikas Kunnure ('the opponent') under section 5(2)(b) of the Trade Marks Act 1994 ('the Act') on the basis of the following earlier UK Trade Mark:

TM details	Services relied on
Trademark no. 3124473  Filing date: 27 August 2015 Registration date: 1 January 2016	Class 43 - Accommodation reservation services; Agency services for booking hotel accommodation; Agency services for reservation of restaurants; Appraisal of hotel accommodation; Arranging of accommodation for tourists; Bar services; Bars; Bistro services; Booking of hotel accommodation; Booking services for hotels; Cafe services; Cafés; Club services for the provision of food and drink; Cocktail lounge

	<p>services; Coffee shop services; Coffee shops; Consultancy services relating to baking techniques; Consultancy services relating to food; Consultancy services relating to food preparation; Consultancy services relating to hotel facilities; Consulting services in the field of culinary arts; Cookery advice; Corporate hospitality (provision of food and drink); Delicatessens [restaurants]; Drink dispensing machines (rental of); Fast food restaurant services; Fast-food restaurants; Food cooking services; Food preparation; Food preparation services; food takeaway service; Hospitality services [food and drink]; Hotel catering services; Hotel reservation services; Hotel reservations; Hotel-reservation; Information relating to hotels; Making hotel reservations for others; Mobile restaurant services; Preparation of food and beverages; Providing hotel accommodation; Providing reviews of restaurants and bars; Provision of food and drink; Provision of food and drink in restaurants; Provision of information relating to bars; Provision of information relating to hotels; Provision of information relating to restaurants; Provision of information relating to the booking of accommodation; Provision of information relating to the preparation of</p>
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	food and drink; Pubs; Rating holiday accommodation; Reservation services for accommodation; Restaurant information services; Restaurant reservation services; Restaurant services; Restaurants; Restaurants (self-service-); Restaurants (Self-service -); Salad bars; Self-service cafeteria services; Serving food and drinks; Snack bar services; Snackbars; Wine bars.
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3. The applicant filed a counterstatement denying the grounds of opposition.

4. The opponent's trademark is an earlier mark, in accordance with Section 6 of the Act but is not subject to proof of use requirements as it has not been registered for five years or more before the publication date of the applicant's mark, as per section 6A of the Act.

5. Both parties filed written submissions only. Neither party requested to be heard. I now make this decision based on the papers before me.

DECISION

6. Section 5(2)(b) of the Act is as follows:

“5(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 on the part of the public, which includes the likelihood of association with the earlier trade mark.

7. The leading authorities which guide me are from the Court of Justice of the European Union ('CJEU'): *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.

The principles

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

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

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

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

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

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive 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.

COMPARISON OF SERVICES

8. The services to be compared are:

Opponent's services	Applicant's services
Class 43 - Accommodation reservation services; Agency services for booking hotel accommodation; Agency services for reservation of restaurants; Appraisal of hotel accommodation; Arranging of accommodation for tourists; Bar	Class 43 - Services for providing food and drink; restaurants, takeaways fast food services, bar and catering services; booking and reservation services for restaurants; Catering services for parties. Catering services

<p>services; Bars; Bistro services; Booking of hotel accommodation; Booking services for hotels; Cafe services; Cafés; Club services for the provision of food and drink; Cocktail lounge services; Coffee shop services; Coffee shops; Consultancy services relating to baking techniques; Consultancy services relating to food; Consultancy services relating to food preparation; Consultancy services relating to hotel facilities; Consulting services in the field of culinary arts; Cookery advice; Corporate hospitality (provision of food and drink); Delicatessens [restaurants]; Drink dispensing machines (rental of); Fast food restaurant services; Fast-food restaurants; Food cooking services; Food preparation; Food preparation services; food takeaway service; Hospitality services [food and drink]; Hotel catering services; Hotel reservation services; Hotel reservations; Hotel-reservation; Information relating to hotels; Making hotel reservations for others; Mobile restaurant services; Preparation of food and beverages; Providing hotel accommodation; Providing reviews of restaurants and bars; Provision of food and drink; Provision of food and drink in restaurants; Provision of information relating to bars; Provision of information</p>	<p>for the provision of food; Catering services for the provision of food and drink; Consultancy services in the field of food and drink catering services; Consultancy services relating to food preparation; Corporate hospitality (provision of food and drink); Fast food restaurant services; Food and drink catering for banquets; Food and drink catering for cocktail parties; Food and drink catering for institutions; Food cooking services; Outside catering services; Take-away food services; Hospitality services [food and drink]; restaurants catering services; bars; Night club services [provision of food]; Organisation of catering for birthday parties; Outside catering services; Preparation and provision of food and drink for immediate consumption; Preparation of food and beverages; Providing food and drink catering services for fair and exhibition facilities; Providing food and drink for guests in restaurants; Providing food and drink for guests; Take-away fast food services for providing food, fast food and drink services; providing online website services for Takeaways restaurants; providing platform to place the menu for the restaurants takeaways to orders for food and drink online; food ordering and restaurant booking services; operating</p>
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relating to hotels; Provision of information relating to restaurants; Provision of information relating to the booking of accommodation; Provision of information relating to the preparation of food and drink; Pubs; Rating holiday accommodation; Reservation services for accommodation; Restaurant information services; Restaurant reservation services; Restaurant services; Restaurants; Restaurants (self-service-);Restaurants (Self-service -);Salad bars; Self-service cafeteria services; Serving food and drinks; Snack bar services; Snackbars; Wine bars.	restaurant and take away fast food services.
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9. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, (*Merica*) the General Court stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

10. The applicant's services are encompassed by the opponent's terms 'provision of food and drink' and 'restaurant reservation services' and are therefore considered identical on the *Meric* principle.

AVERAGE CONSUMER AND THE PURCHASING ACT

11. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

12. 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.”



13. The average consumer for these services will be the general public and businesses. There will be a varying level of attention paid depending on the particular service. For example the purchase of a takeaway or a fast food meal is likely to be less considered as these are common casual purchases whereas the selection of a catering provider for an event will be a more considered process depending on the event, cost and venue.

14. With regard to the purchasing process, selection of food and drink provision is primarily a visual act. Consumers are likely to read advertising material, menus and the like or search the internet to find a suitable caterer or restaurant or they will see

the frontage of a food provider's premises. However, I also consider there could be an aural element if catering providers or restaurants are recommended by word of mouth or if food is ordered over the telephone.

COMPARISON OF MARKS

15. The marks to be compared are:

Opponent's mark	Applicant's mark
 The logo consists of the text "Click-EAT" in a red, serif font.	 The logo features the word "NOW" in red, "CLICK2" in yellow, and "EAT" in red. A red arch with a dot at its peak spans over the text. A yellow arrow points to the "O" in "NOW".

16. 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 Court of Justice of the European Union 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.”

17. 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.

18. The opponent's mark consists of the two words **Click-EAT** in colour, separated by a hyphen. The colour is recorded as Orange Pantone 18-1561 TPX. I note the applicant mentions the colour of the opponent's mark in his submission:

“...they have not portrayed their brand in its true identity for e.g. the colour is a very important part of the brand identity and they have not displayed their brand in its truest form as evidence.”

I do not think the opponents have set out to disguise their mark. That the opponent's mark has appeared in correspondence as black and white, I put down to material having been emailed, faxed or photocopied in multiple copies. However for this decision I am considering the opponent's mark as it was registered and I do not think that the colour will have that much impact. Rather it is the words **Click-EAT** which will dominate the overall impression of the mark.

19. The applicant's mark is a composite one comprising several separate devices of cutlery, an arrow and an arc and circle, as well as the stylised words and numeral NOW CLICK 2 EAT. This mark is also presented in colour. It is a general rule of thumb that words speak louder than devices. I consider that rule to be applicable here. Although the device elements are distinctive and have substantial visual impact, it is the word element, NOW CLICK 2 EAT, by which the mark is likely to be referred to and which carries the greater weight in the overall impression of the mark.

20. In a visual comparison of the marks, the only point of similarity are the words CLICK and EAT. The opponent's mark has no other visual elements whereas the applicant's mark has an arc and circle device placed above the words, cutlery devices forming part of the words themselves and an arrow resembling a computer cursor below the words. I find there is a low degree of visual similarity.

21. In an aural comparison of the marks, it is unlikely that a consumer would vocalise the device elements of the applicant's mark. It is more likely that only the words NOW CLICK 2 EAT (with the numeral 2 being commonly swapped for the word 'to') would be vocalised. The opponent's mark would be vocalised as CLICK EAT. The

two common elements of the marks are CLICK and EAT and they are pronounced in the same way and are aurally identical. I consider there to be a medium degree of aural similarity.

22. In a conceptual comparison of the marks, to the extent that either mark has an ‘immediately graspable concept’¹, which at its most literal could be seen as an instruction to click then eat, then it would be highly similar, if not identical. The arc and circle device element is unlikely to form part of a conceptual hook but the cutlery and arrow device may reinforce the notion of clicking and eating.

DISTINCTIVE CHARACTER OF THE EARLIER MARK

23. The distinctive character of the earlier mark must be considered. The more distinctive it is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). 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

¹ It has been highlighted in numerous judgments such as *The Picasso Estate v OHIM*, Case C-361/04 that it is only concepts capable of immediate grasp by the consumer that are relevant.

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).”

24. The opponent did not file any evidence showing use for the services relied on so I can only consider the inherent distinctiveness of the earlier mark.

25. As previously stated the earlier mark contains two words **CLICK-EAT** separated by a hyphen. Although this mark does not directly describe the provision of food and drink ordered on line, or restaurant reservation services provided on line, as it is truncated and lacks a correct grammatical structure, I find that the mark does at least allude to those services. I find that it has a low level of inherent distinctiveness for those services. In relation to the opponent’s services which are not provided on-line (the specification is not limited to on line services), the distinctiveness is higher but I would still pitch it as below average.

LIKELIHOOD OF CONFUSION

26. I must now draw together my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors:

- a) The interdependency principle, whereby a lesser degree of similarity between the services may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc*).
- b) The principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*).
- c) The factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*).

27. I have found that the marks are visually similar only to a low degree, aurally similar to a medium degree and conceptually similar to a high degree, if not identical. In addition I have found that a varying degree of attention will be paid to purchasing of the services. I also remind myself that the purchasing process will be largely visual and so this factor is particularly important. Taking these factors into account, together with the low/below average degree of inherent distinctiveness of the earlier mark, I find that, notwithstanding the identical services in play, there is no likelihood of confusion either directly or indirectly, even having regard for the potential for imperfect recollection of the marks.

CONCLUSION

28. The opposition fails under section 5(2)(b) of the Act for all of the services opposed in class 43.

COSTS

29. The applicant has been successful and is therefore, in principle, entitled to a contribution towards its costs. As the applicant is unrepresented, at the conclusion of the evidence rounds the tribunal invited them to indicate whether they wished to make a request for an award of costs, and if so, to complete a pro-forma including a breakdown of their actual costs, including providing accurate estimates of the number of hours spent on a range of given activities relating to the defence of the opposition; it was made clear to the applicant that if the pro-forma was not completed “no costs will be awarded”. The applicant did not respond to that invitation. Consequently, I make no order as to costs.

Dated this 17TH day of May 2017

June Ralph

For the Registrar,

For the Comptroller General

