

**TRADE MARKS ACT 1994**

**IN THE MATTER OF:**

**OPPOSITION No. 409277**

**IN THE NAME OF THE JOLLY HOG LTD**

**TO TRADE MARK APPLICATION No. 3218068**

**IN THE NAME OF THE PIG & PALLET LTD**

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**DECISION**

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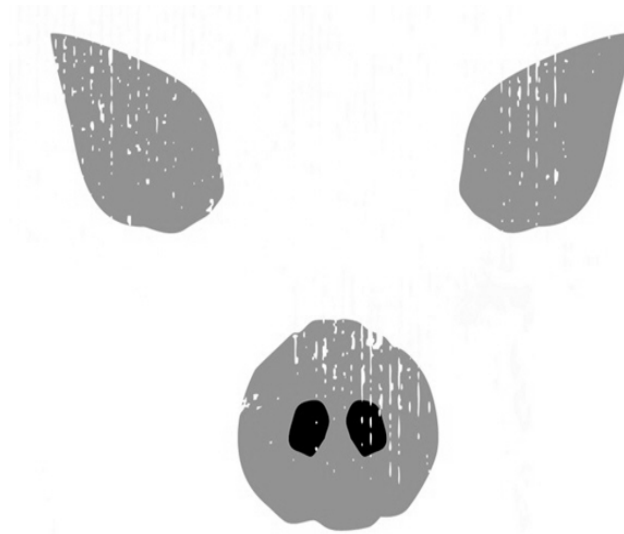
1. The Pig & Pallet Ltd (“the Applicant”) applied for registration of the following sign as a trade mark in respect of a wide range of goods and services in Classes 29, 30, 35, 39, 42 and 43 with effect from 12 March 2017:

**Trade Mark Application No. 3218068**



2. The application for registration was opposed by The Jolly Hog Ltd (“the Opponent”) under ss.5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 upon the basis of the earlier rights to which it was entitled by virtue of registration and through use of the following trade mark for goods and services in Classes 29, 30 and 43:

**Trade Mark No. 3092549**



3. The goods and services in issue were as follows:

**Opponent’s goods and services being relied upon**

**Class 29** – Meat; sausages; meat burgers

**Class 30** – Sauces (condiments); sausage rolls

**Applicant’s goods and services**

**Class 29** - Sausages; Preserved sausages; Cured sausages; Hotdog sausages; Hot dog sausages; Smoked sausages; Meat products being in the form of burgers; Meat burgers; Burgers; Uncooked sausages; Sausages; Preserved sausages; Cured sausages; Hotdog sausages; Hot dog sausages; Smoked sausages; Meat products being in the form of burgers; Meat burgers; Burgers.

**Class 30** - Sauces for barbecued meat; Sauces; Sauces for food; Sauces for pizzas; Sauces containing nuts; Sauces for use with pasta; Sauces for pasta; Sauces flavoured with nuts; Sauces for ice cream; Sauces for rice; Cooking sauces; Sauces for frozen fish; Sauces for chicken; Sauces [condiments]; Spice rubs; Hot dogs [sausages in a bread roll]; Burgers contained in bread rolls; Hot dogs [sausages in a bread roll]; Hotdogs being cooked sausages in bread rolls; Spice rubs; Sauces for barbecued meat; Sauces; Sauces for food; Sauces for pizzas; Sauces containing nuts; Sauces for use with pasta; Sauces for pasta; Sauces flavoured with nuts; Sauces for ice cream; Sauces

- for rice; Sauces for frozen fish; Sauces for chicken; Sauces [condiments]; Savory sauces; Burgers contained in bread rolls.
- Class 35** - Restaurant management for others; Restaurant management for others.
- Class 39** - Delivery of food by restaurants; Delivery of food by restaurants.
- Class 42** - Design services in relation to restaurants; Design of restaurants.
- Class 43** – Services for providing food and drink; restaurant, bar and catering services; information, consultancy and advice in relation to the foregoing services.
- Class 43** - Restaurant services incorporating licensed bar facilities; Restaurant services provided by hotels; Hotel restaurant services; Carvery restaurant services; Carry-out restaurants; Restaurant services; Restaurants; Restaurant reservation services; Grill restaurants; Delicatessens [restaurants]; Restaurant information services; Restaurants (Self-service -); Restaurant services incorporating licensed bar facilities; Restaurant services provided by hotels; Hotel restaurant services; Carvery restaurant services; Take-out restaurant services; Carry-out restaurants; Restaurant services; Restaurants; Provision of food and drink in restaurants; Restaurant reservation services; Grill restaurants; Delicatessens [restaurants]; Restaurant information services; Self-service restaurant services; Restaurants (Self-service -); Self-service restaurants.

4. The Opposition was determined, without recourse to a hearing, on the basis of the papers on file (which included written submissions filed by both parties). It was rejected for the reasons given by Mr. C.J. Bowen on behalf of the Registrar of Trade Marks in a decision issued under reference BL O-339-18 on 4 June 2018. The Opponent was ordered to pay £900 to the Applicant in respect of its costs of the proceedings in the Registry.
5. Shortly stated, the question for determination by the Hearing Officer under s.5(2)(b) of the Act was whether there were similarities (in terms of marks and goods or services) that would have combined to give rise to the existence of a likelihood of confusion if the marks in issue were used concurrently for goods or services of the kind for which they were respectively registered and sought to be registered by traders operating independently of one another in the United Kingdom in March 2017.
6. In paragraphs [41] to [43] and [46] of his decision, the Hearing Officer came to the conclusion that there was no meaningful degree of similarity between the services

in Classes 35 and 42 covered by the contested application for registration and the services in Class 43 covered by the Opponent's earlier trade mark registration. He decided in paragraphs [34] to [39], [44], [45] and [48] to [50] that the remainder of the goods and services covered by the contested application for registration were either identical or relevantly similar to those covered by the Opponent's earlier trade mark registration.

7. The Hearing Officer addressed 'The average consumer and the nature of the purchasing act' in paragraphs [51] to [54]. He considered the goods in issue in Classes 29 and 30 to be *'low cost everyday items which are most likely to be selected with a relatively low degree of care'* and observed that *'While visual considerations will, as a consequence, dominate the selection process, aural considerations in, for example, the form of requests to sales assistants must also be kept in mind'*. With regard to the Class 39 services in issue, he considered that *'As the average consumer is most likely to select such services either online or by telephone when placing an order, a mixture of both visual and aural considerations will come into play. Given the likely low cost involved, I would expect the average consumer to pay a relatively low degree of attention to the selection of such services'*.
8. His assessment in relation to the Class 43 services in issue was as follows:

[54] Finally, the services in class 43. My own experience informs me that the vast majority of the services at issue are most likely to be selected having considered, for example, promotional material and reviews (in hard copy and online) and on signage appearing on the high street; once again visual considerations will be an important part of the selection process. However, as such services are also, in my experience, very likely to be the subject of word-of-mouth recommendations, aural considerations will be a not-insignificant feature of the process. The degree of care the average consumer will display when selecting the services at issue is likely to vary. Contrast, for example, the low degree of care likely to be taken when one selects a venue for an impromptu cup of coffee, with the fairly high degree of attention one is likely to take when selecting a restaurant for an important family event. That leaves "restaurant reservation services" to consider. As such services are, in my experience,

most likely to be selected online, visual considerations will, once again, dominate the selection process. As to the degree of care the average consumer will pay when selecting such services, as they are likely to be mindful of a range of factors such as the number of restaurants listed, ease of use etc, I would expect them to pay an average degree of attention during the selection process.

9. In his ‘Comparison of trade marks’ in paragraphs [55] to [63], the Hearing Officer examined the features of the marks in issue and assessed their impact upon the way in which the marks were likely to be perceived and remembered. On comparing the marks as a whole he concluded that ‘*Balancing the similarities and differences results in a low to medium degree of visual similarity between the competing trade marks*’, that the absence of any verbal content in the Opponent’s earlier registered trade mark made it unnecessary for him to conduct an aural comparison and that the marks were ‘*conceptually similar to a fairly high degree*’ as a result of their propensity to ‘*evoke the concept of a pig in the mind of the average consumer.*’
10. For the reasons he gave in paragraphs [68] to [74] of his decision, he was not satisfied that the evidence and materials before him were sufficient to show that the Opponent’s earlier registered trade mark benefitted from an enhanced distinctive character acquired through use. He found it to be a mark possessed of a low degree of inherent distinctiveness upon the following basis:

[67] ...notwithstanding the absence of the rest of the face (upon which the opponent places some importance), the opponent accepts that its trade mark will be conceptualised by the average consumer as a device of a pig’s snout and ears. Considered on that basis in the context of the goods in class 29 (all of which could be or include pork), class 30 (which would include sauces and condiments particularly suited for use with pork and sausage rolls which would include pork) or, inter alia, services for providing food and restaurant and catering services in class 43 (all of which may focus on pork as a principal ingredient), any inherent distinctive character the opponent’s trade mark may enjoy is, in my view, low.

11. The ‘likelihood of confusion’ was considered in paragraphs [75] to [87] of the Hearing Officer’s decision, where it was ultimately rejected for the following reasons:

[83] The only similarity between the competing trade marks is in respect of different stylised representations of the snout and ears of a pig. Although that is the only component in the opponent’s trade mark and a separate and identifiable component of the applicant’s trade mark, I have concluded that in relation to the goods and services I have found to be either identical (or similar to varying degrees), that component is possessed of only a low degree of inherent distinctive character. At this point I remind myself that the fact the opponent’s trade mark only possesses a weak distinctive character does not preclude a likelihood of confusion. However, the differences between the competing trade marks and, in particular, the presence in the applicant’s trade mark of the words “THE PIG & PALLET”, are, in my view more than sufficient to avoid an average consumer paying even the lowest degree of attention during the selection process mistaking one trade mark for the other.

...

[86] The fact that the shared component is of low distinctive character is important. That two unrelated undertakings who either trade or wish to trade in the commercial areas at issue in these proceedings use a device component which sends such a clear conceptual message to the average consumer is, in my view, unsurprising. That the opponent’s principal use is with the words “THE JOLLY HOG” and the applicant’s trade mark includes, inter alia, the words “THE PIG & PALLET” support that conclusion. In short, I am satisfied that the mere presence of the stylised device of a pig’s snout and ears in the applicant’s trade mark is also unlikely to lead to indirect confusion.

12. The Opponent appeals to an Appointed Person under s.76 of the Act contending, in substance, that the Hearing Officer did not fully and correctly grapple with the matters he was called upon to decide under s.5(2)(b), with the result that his decision was vitiated by error and should be set aside. The objection to registration under s.5(4)(a) was not pursued on appeal.

13. These are the Grounds of Appeal which accompanied the Opponent's Form TM55P:
- 1.1 The Decision is erroneous in its comparison of the goods and services at issue owing to a misunderstanding of the terms "information, consultancy and advice in relation to the foregoing services" in the class 43 specification of the Opponent's earlier mark. As a consequence, there is no consideration in the Decision of a valid part of the opposition. Details are provided herein at Annex A.
  - 1.2 The Decision is erroneous in failing to identify all of the average consumers relevant to a correct assessment of the merits of the opposition. As a consequence, the assessment of purchasing decisions is too narrow and simplistic, contributing to mistaken conclusions. Details are provided herein at Annex B.
  - 1.3 The Hearing Office has erred in the way he has gone about assessing the distinctiveness of the Opponent's earlier mark. As a consequence, the Decision contains no proper consideration of the Opponent's mark, it does not properly consider the mark in relation to the goods and services for which it is registered, and it mis-construes how the mark will be perceived by average consumers. Details are provided herein at Annex C.
  - 1.4 As a result of the aforementioned errors, the final assessment of likelihood of confusion is wrong and overly simplistic, and absent in some areas. In consequence, the Decision as a whole is not a valid and reliable decision. [*Details were provided at Annex D*].

Ground 1.1 and Annex A

14. I accept the Opponent's contention that the Hearing Officer omitted to give full meaning and effect to the words '*services for providing food and drink, restaurant, bar and catering services, information, consulting and advice in relation to the foregoing services*' when considering the scope of its earlier trade mark registration in Class 43. That wording naturally embraces the business activity of providing

*'information'* to consumers and/or suppliers of *'services for providing food and drink, restaurant, bar and catering services'* and also the business activity of providing *'consultancy'* to consumers and/or suppliers of such services and also the business activity of providing *'advice'* to consumers and/or suppliers of such services. Those business activities are relevantly similar to the activities of providing *'restaurant management for others'* (Class 35) and providing *'design services in relation to restaurants, design of restaurant'* (Class 42) as specified in the contested application for registration. It follows that all of the goods and services listed in the contested application for registration should have been regarded as relevantly similar (in so far as they were not identical) to the goods and services listed in the Opponent's earlier trade mark registration.

Ground 1.2 and Annex B

15. I accept the Opponent's contention that the Hearing Officer approached 'The average consumer and the nature of the purchasing act' on a basis which centred upon members of the general public to the exclusion of food retailers in the market for goods of the kind specified in Classes 29 and 30 of its earlier trade mark registration and business people in the market for services of the kind specified in Class 43 of that registration. I am also prepared to accept as relevant the Opponent's contentions in Annex B to the effect that: members of the general public buy and select products of the kind specified in Classes 29 and 30 *'with as much care as is needed to purchase the brands they want. The fact that this degree of care is relatively low is not the point, it is as high as it needs to be to minimise the risk of unintended purchases'*: Annex, para. B.2(1); *'the average consumer who is a purchaser employed by a food retailer will be brand aware within the food sector'*: Annex, para. B.2(2); and the average consumer who is a member of the trade in the market for services of the kind specified in Class 43 *'is likely to be reasonably circumspect in choosing the Opponent's services, with a selection process that may involve personal recommendation and online and other researches'*: Annex, para. B.2(3).



Ground 1.3 and Annex C

16. There are two main strands to this aspect of the Opponent's challenge to the Hearing Officer's decision.
17. In the first place, it is emphasised that the specific individuality of the earlier registered trade mark resides in the quirkiness of its graphic representation:

In fact, the Opponent's trade mark is not an ordinary representation of a pig, nor is it an ordinary representation of a pig's head. It is an out-of-the-ordinary representation of the snout and ears of a pig, in isolation of all other features, as if floating in space. There are no eyes, and eyes are important in human cognitive recognition of faces, so their absence here has a rather disturbing effect. Furthermore, the lack of mouth, jaw-line, cheeks, and forehead all add to the impressionistic feel of the mark.

The point being (and I agree) that the Hearing Officer should have assessed the distinctive character of the mark by reference to the specific individuality of it as graphically presented to the eye of the relevant average consumer and not simply by reference to the broad generality of its conceptual connotations '*as a device of a pig's snout and ears*'.

18. In the second place, it is emphasised that there is no mention of "*pork*" in the list of goods and services covered by the earlier trade mark registration or the contested application for registration. The point being (and I agree) that the Hearing Officer could not correctly assess the distinctive character of the Opponent's trade mark as inherently '*low*' or '*weak*' in relation to all goods and services of the kind listed in its earlier trade mark registration or in relation to all goods and services of the kind listed in the contested application for registration simply by linking the assessment of it to subsets thereof consisting specifically of goods '*all of which could be or include pork*' in Class 29, goods '*which would include sauces and condiments particularly suited for use with pork and sausage rolls which would include pork*'

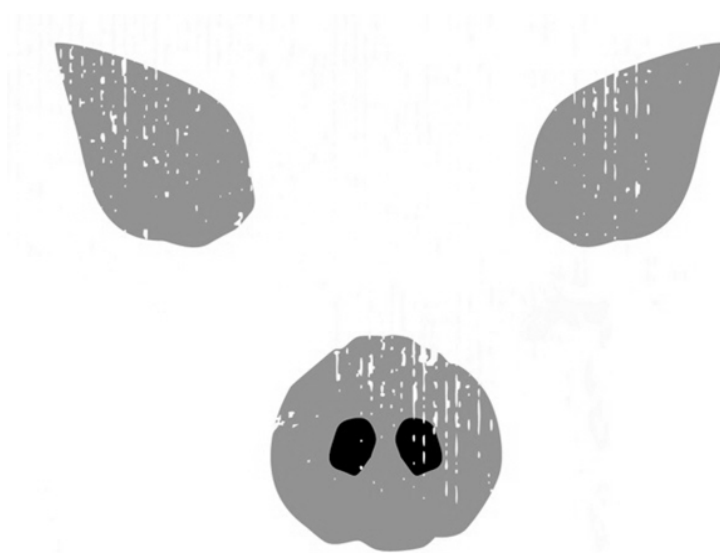
in Class 30 and *'services for providing food and restaurant and catering services ... all of which may focus on pork as a principal ingredient'* in Class 43.

Ground 1.4 and Annex D

19. It was contended before me (as it was at first instance) that there was a likelihood of confusion by reason of the Applicant's mark being a composite mark in which the stylised device of a pig's snout and ears similar to the stylised device protected by the Opponent's earlier trade mark registration performs an independent distinctive role in relation to goods and services that are identical or relevantly similar to those covered by the earlier trade mark registration.
20. I must emphasise that it is obligatory for the purposes of the present proceedings to regard the Opponent's trade mark as validly registered, hence possessed of a distinctive character to at least some degree in relation to goods and services of the kind for which it is registered: Case C-43/15P BSH Bosch und Siemens Hausgerate GmbH EU:C: 2016: 837 at paragraph [65] to [69]. This does not rule out the possibility that *'... when the elements of similarity between two signs derive from the fact that they share a component with weak distinctive character, the impact of those elements of similarity on the global assessment of the likelihood of confusion is itself low ...'*: Case T-418/17 Eduard Meier GmbH EU:T:2018:540 at paragraph [56]. However, distinctiveness is a relative concept in the sense that it falls to be assessed with due regard for the norms and variations likely to be encountered in the market sector(s) in which protection by registration has been sought or obtained.
21. This is a matter on which no evidence was placed before the Registrar by either party. In particular, as the Hearing Officer noted in paragraph [67] of his decision, the Applicant provided no evidence to substantiate its assertions to the effect that the Opponent's registered trade mark is *'a commonplace image'* and *'simply a commonplace representation of a pig's features'*. The distinctiveness of the earlier trade mark fell to be considered as a matter of impression. It can be seen that the trade mark is conspicuously emblematic. The capacity it possesses, as a result of

that, to individualise goods and services to a single economic undertaking is real to a degree that I am not willing to regard either as 'low' or 'weak' in the sense of negligible or inconsequential in relation to goods or services of the kind listed in the earlier trade mark registration or of the kind listed in the contested application for registration.

22. The Hearing Officer referred to the two devices as '*different stylised representations of the snout and ears of a pig*' in paragraphs [60] and [83] of his decision. He nonetheless considered that they were sufficiently similar to result in the Applicant's trade mark as a whole being visually similar (to '*a low to medium degree*') and also conceptually similar (to '*a fairly high degree*') to the Opponent's earlier trade mark. I think it is evident on appraisal of the counterpart features of the two devices that they not only represent the concept of a pig's face, but do so graphically in a distinctively similar manner:





23. I would expect the present opposition to have succeeded under s.5(2)(b) of the Act if the Applicant had been seeking to register nothing more than the device shown in the preceding paragraph for the goods and services of interest to it as listed in the contested application for registration. It does not follow, however, that the presence of that device in the composite mark which it has applied to register is necessarily sufficient to render the contested application for registration objectionable under s.5(2)(b). The fate of the application depended essentially upon whether there was or was not a likelihood of confusion on the particular basis for which the Opponent contended.
24. The approach to assessment invoked by the Opponent in support of its objection under s. 5(2)(b) has been considered in a number of judgments of the CJEU. It was addressed in the following terms in Case C-20/14 BGW Beratungs-Gesellschaft Wirtschaft mbH EU:C:2015:714 at paragraphs [35] to [41]:
35. In the second place, it is necessary to bear in mind the case-law according to which the global assessment of the likelihood of confusion must, so far as concerns the visual, phonetic or conceptual similarity of the marks at issue, be based on the overall impression given by

the marks, bearing in mind, in particular, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (judgment in *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 21 and the case-law cited).

36. Assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole (judgment in *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 41, and judgment in *Aceites del Sur-Coosur v Koipe and OHIM*, C-498/07 P, EU:C:2009:503, paragraph 61).
37. Although the overall impression conveyed to the relevant public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (judgment in *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraphs 41 and 42, and judgment in *Nestlé v OHIM*, C-193/06 P, EU:C:2007:539, paragraphs 42 and 43 and the case-law cited).
38. In that regard, the Court has stated that, even if the element common to the marks at issue cannot be regarded as dominating the overall impression, it must be taken into account in the assessment of the similarity of those marks, to the extent that it constitutes in itself the earlier mark and retains an independent distinctive role in the trade mark consisting, inter alia, of that element, for which registration is sought. Where a common element retains an independent distinctive role in the composite sign, the overall impression produced by that sign may lead the public to believe that the goods or services at issue come, at the very least, from companies which are linked economically, in which case a likelihood of

confusion must be held to be established (judgment in *Medion*, C-120/04, EU:C:2005:594, paragraphs 30 and 36, and order in *ecoblue v OHIM and Banco Bilbao Vizcaya Argentaria*, C-23/09 P, EU:C:2010:35, paragraph 45).

39. However, the Court has also stated that a component of a composite sign does not retain such an independent distinctive role if, together with the other component or components of the sign, that component forms a unit having a different meaning as compared with the meaning of those components taken separately (judgment in *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 25).
  40. It must also be pointed out, as the Advocate General stated at point 40 of his Opinion, that, in principle, even an element which has only a weak distinctive character may dominate the overall impression of a composite mark or have an independent distinctive role in that mark within the meaning of the case-law resulting from the judgment in *Medion* (C-120/04, EU:C:2005:594), since, it may, because of, inter alia, its position in the sign or its size, make an impression on consumers and be remembered by them.
  41. In the present case, it will be for the national court to ascertain the overall impression made on the relevant public by the later mark, by means of, inter alia, an analysis of the components of that mark and of their relative weight in the perception of that 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 (judgment in *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 34).
25. The guidance re-affirmed in paragraphs [38] to [40] was clearly pertinent to the determination that the Hearing Officer was required to make in the present case. I can see from paragraph [79] of his decision that he was mindful of the summary provided by Arnold J. in Whyte and Mackay Ltd v. Origin Wine UK Ltd [2015] EWHC 1271 (Ch) at paragraphs [18] to [21] as to the required approach. What I cannot see is any assessment or finding to the effect that the device of a pig's snout

and ears, together with the other components of the Applicant's trade mark, forms a unit which conveys a different meaning as compared with the meaning of those components taken separately. To the contrary, he expressly decided (and I agree) that the device is '*a separate and identifiable component of the applicant's trade mark*' (paragraph [83]) which '*given its size and positioning at the top of the trade mark ... will make an important contribution to the overall impression conveyed*' (paragraph [59]).

26. With reference to the remainder of the Applicant's trade mark, the Hearing Officer considered (and I agree):

- (i) that although the brown square, which acts as a background on which the other components are presented in white, contributed to the overall impression conveyed '*it has very little, if any, distinctive character*';
- (ii) that although the representations of open and closed square brackets make a not insignificant contribution to the overall impression conveyed, they are '*unlikely to possess a great deal of distinctive character*';
- (iii) that the words DEVON MADE have '*no distinctive character*' and '*will play little or no part in the overall impression conveyed*', with the horizontal lines above and below them being '*likely to go largely unnoticed*' and '*they too will play little or no part in the overall impression conveyed*'; and
- (iv) that the average consumer's reaction to '*the distinctive combination THE PIG & PALLET*' (paragraph 60) will be '*conditioned by their likely familiarity with similar combinations being used in the context of, for example, public house and restaurant services*' and '*Given the size of the words and their positioning in the centre of the trade mark, their contribution to the overall impression the trade mark conveys and its distinctiveness will be significant*'.

27. If the Hearing Officer had given due weight to the matters referred to in paragraphs [14] to [22] above, he would have been bound to recognise that the Applicant's trade mark featured what was apt to be regarded as an appellation (THE PIG & PALLET) redolent of the name of a public house or restaurant presented in juxtaposition with a '*separate and identifiable*' device which was distinctively similar to the Opponent's earlier registered trade mark, in a manner likely to result in both the device making an '*important contribution to the overall impression conveyed*' and the appellation making a '*significant*' contribution to '*the overall impression the [Applicant's] trade mark conveys and its distinctiveness*', all in the context of use in commerce in identical or relevantly similar sectors of trading activity.
28. I do not accept that it was open to the Hearing Officer on full appraisal of the marks in issue to rule out the existence of a likelihood of confusion upon the premise that '*The only similarity between the competing trade marks is in respect of different stylised representations of the snout and ears of a pig*': paragraph [83]; and/or upon the premise that '*two unrelated undertakings who either trade or wish to trade in the commercial areas at issue in these proceedings use a device component which sends such a clear conceptual message to the average consumer is ... unsurprising*': paragraph [86]; and/or upon the premise that '*the mere presence of the stylised device of a pig's snout and ears in the applicant's trade mark is also unlikely to lead to indirect confusion*': paragraph [86].
29. In the Applicant's trade mark, the stylised device of a pig's snout and ears supplements and is supplemented by the words THE PIG & PALLET seen as a name. I do not doubt that the '*words speak louder than the device*' in the context of the Applicant's mark as a whole. The device is nonetheless presented as a '*separate and identifiable*' emblem of an economic operator who uses the name THE PIG & PALLET. It makes an '*important contribution to the overall impression conveyed*' by the Applicant's trade mark. It is also distinctively similar to the device protected by the Opponent's earlier trade mark registration. I do not see how it could fail to give rise to perceptions of a link between the marks in issue in the mind of the relevant average consumer (who is taken to be reasonably well-informed and



reasonably observant and circumspect) in the event of concurrent use of the marks, keeping in mind all the circumstances in which they might be used in the course of trade in relation to goods and services of the kind listed in the earlier trade mark registration and the contested application for registration (see Case C-533/06 O2 Holdings Ltd v. Hutchison 3G Ltd EU:C:2008:339 at paragraph [66]).

30. Mere association, in the sense that the later mark brings the earlier mark to mind in a way which is not sufficient to result in the existence of a likelihood of confusion, is beyond the reach of s.5(2)(b): Case C-251/95 Sabel BV v. Puma AG EU:C:1997:528 at paragraph [26]; Case C-425/98 Marca Mode CVC v. Adidas AG EU:C:2000:339 at paragraph [41]. If it could correctly be said that the devices in question were visually different to a degree which reduced the resemblance between them to the level of ‘analogous semantic content’ (in the words of paragraph [26] of the Judgment of the CJEU in Sabel), that would very probably have been sufficient to justify rejection of the objection to registration under s.5(2)(b) in the present case. However, the degree of similarity between them results in what I would call ‘graphically convergent representations of the same semantic content’. I am satisfied that use of the Applicant’s trade mark for goods and services of the kind specified in the contested application for registration would be likely, by reason of the device it contains, to cause confusion as to whether they emanate directly or indirectly from the undertaking responsible for use of the Opponent’s similar device in relation to goods and services of the kind specified in its earlier trade mark registration. And none the less so because the device is coupled with THE PIG & PALLET used as a name by which that undertaking is additionally identified.
31. For the reasons I have given, the Opponent’s appeal is allowed and the Hearing Officer’s decision and order as to costs are set aside. The contested application for registration is remitted to the Registrar for refusal in its entirety on further processing in accordance with the provisions of the Trade Marks Act 1994 and the Trade Marks Rules 2008. I approach the question of costs in the manner indicated in paragraphs [12] to [14] of my decision in AMARO GAYO COFFEE Trade Mark BL O-257-18 (25 April 2018). Having regard to what I consider to be the amount

of effort and expenditure that is likely to have been reasonably and productively incurred by the Opponent in opposing the contested application for registration, I think it would be reasonable to order the Applicant to pay a total of £1,650. to the Opponent in respect of its costs of the proceedings at first instance and on appeal. That sum is to be paid within 21 days of the date of this decision.

Geoffrey Hobbs QC

25 February 2019

The Opponent was represented by Mr. Victor Caddy of Wynne-Jones, Lainé & James LLP. The Applicant was represented by Mr. Stephen Williams, a director of the company. The Registrar took no part in the appeal.