

O/110/20

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3299021

BY

SAMERA HUSSAIN

TO REGISTER THE FOLLOWING TRADE MARK IN CLASS 43



AND OPPOSITION THERETO (NO. 413829)

BY

ALL STAR LEISURE (GROUP) LIMITED

Background and Pleadings

1. Samera Hussain (“the Applicant”) applied to register the trade mark as displayed on the front cover page on 23 March 2018. The application was published for opposition purposes on 22 June 2018. The Applicant seeks to register its trade mark for the following services in class 43: *services for providing food and drink; restaurant, bar and catering services.*

2. All Star Leisure (Group) Limited (“the Opponent”) opposes the application under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). It relies on its three earlier registered trade marks and those services as displayed below:

1. EU009102757¹



EAT + DRINK + BOWL

“Mark 757”

Filed 13 May 2010

Published 31 August 2010

Registered 11 February 2011

Class 41: Providing karaoke services; providing recreation facilities; hire facilities and equipment for private and corporate recreational events; hire of bowling alley facilities and equipment for private and corporate events;

¹ Whilst registered for services in classes 35, 41 and 43, for the purposes of this opposition, the Opponent is relying only on its services in classes 41 and 43.

entertainment; bowling alley services; bowling centre services; provision of bowling alley facilities.

Class 43: Services for providing food and drink; preparation of food and drink; catering services; provision of canapés; snack bar services; restaurant services; temporary room hire.

2. EU009102807²



“Mark 807”

Filed 13 May 2010

Published 31 August 2010

Registered 17 February 2011

Class 41: Providing karaoke services; providing recreation facilities; hire of facilities and equipment for private and corporate recreational events; hire of bowling alley facilities and equipment for private and corporate events; entertainment; bowling alley services; bowling centre services; provision of bowling alley facilities.

Class 43: Services for providing food and drink; preparation of food and drink; catering services; provision of canapés; snack bar services; restaurant services; temporary room hire.

² Whilst the Opponent’s mark is registered for services in classes 35, 41 and 43 it has limited its opposition relying on its services in class 41 and 43.

3. UK 2437344³



“Mark 344”

Filed 28 October 2006

Registered 15 August 2008

Class 43: Services for providing food and drink.

3. The Opponent claims that there is a likelihood of confusion because there is an “undeniably strong similarity between the registrations and the application in relation to the actual marks and the identity and similarity in the services covered which clearly show the existence of a likelihood of confusion in the minds of the relevant public”.

4. Ms Hussain filed a defence and counterstatement denying the claims made.

5. In these proceedings Ms Hussain is representing herself whereas the Opponent is represented by Birketts LLP. Neither party filed evidence nor requested a hearing however the Opponent filed submissions in lieu. I do not propose to summarise the Opponent’s submissions, however, I have taken them into account in reaching my decision and will refer to them where necessary. This decision is taken following a careful perusal of the papers.

³ Whilst registered for goods and services in classes 25 and 43 it has limited its opposition relying only on its services in class 43.

Decision

6. The opposition is based on section 5(2)(b) of the Act which states:

“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. An earlier trade mark is defined in section 6 of the Act, which states:

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

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

....

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

8. In these proceedings, the Opponent is relying upon its three trade mark registrations, shown above, which qualify as earlier marks under section 6 of the Act. Whilst the earlier marks have been registered for more than five years at the date the application was published and would ordinarily be subject to the proof of use provisions contained in section 6A of the Act, the Applicant has not sought to require the Opponent to demonstrate proof of use. Consequently, the Opponent is entitled to rely upon its services in Classes 41 and 43, for each of its registrations, as specified, without having to establish genuine use.

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

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 greater degree of similarity between the marks, and vice versa;

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

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

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

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

Comparison of the services

10. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc.* Case C-39/97, where the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

12. In addition in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) 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 für 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.”

13. The competing services are set out as follows:

Applicant’s services	Opponent’s services
<p>Class 43: Services for providing food and drink; restaurant, bar and catering services.</p>	<p><u>Mark 757</u></p> <p>Class 41: Providing karaoke services; providing recreation facilities; hire facilities and equipment for private and corporate recreational events; hire of bowling alley facilities and equipment for private and corporate events; entertainment; bowling alley services; bowling centre services; provision of bowling alley facilities.</p> <p>Class 43: Services for providing food and drink; preparation of food and drink; catering services; provision of canapés;</p>

	snack bar services; restaurant services; temporary room hire.
	<p><u>Mark 807</u></p> <p>Class 41: Providing karaoke services; providing recreation facilities; hire of facilities and equipment for private and corporate recreational events; hire of bowling alley facilities and equipment for private and corporate events; entertainment; bowling alley services; bowling centre services; provision of bowling alley facilities.</p> <p>Class 43: Services for providing food and drink; preparation of food and drink; catering services; provision of canapés; snack bar services; restaurant services; temporary room hire.</p>
	<p><u>Mark 344</u></p> <p>Class 43: Services for providing food and drink.</p>

14. The Applicant seeks registration for “*Services for providing food and drink*” and “*restaurant, bar and catering services*” in class 43 which are identical to the Opponent’s “*Services for providing food and drink; restaurant services; catering services; preparation of food and drink; snack bar services*” either because they are self evidently identical, using the same terms, or are considered as identical under the *Meric* principle, the services being caught by the other party’s broader term.

Average Consumer

15. When considering the opposing trade marks I must determine first of all who the average consumer is for the services and the method of selecting these services. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.

16. 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

17. Only the Opponent made submissions regarding the average consumer submitting that their services relate to “the food and drinks industry as well as to recreational bowling and entertainment facilities. Such services are aimed at the general public and are for mass consumption.” I agree. I consider that the average consumer of both parties’ services are members of the general public who are likely to select the services via visual means following the display of the name at the actual venue, via the internet or on advertising material. The selection process will therefore be primarily visual although I cannot discount aural considerations, following word of mouth recommendations.

18. The level of care taken in the selection of the services will depend on the type of food and drink on offer and may involve a discussion regarding which eating establishment to frequent, the nature of the food, and the type of occasion. Since consumers have such a wide variety of different food and drink experiences on offer and dietary and allergen requirements to consider, then they are increasingly more alert to selecting food and drink services based on these considerations.⁴ However even taking this into account I do not consider that the selection process would involve more than an average level of attention.

Comparison of the marks

19. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

20. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to consider the distinctive and dominant components of the marks and to

⁴ On this issue, see paras 10-16 *Monster Energy Company v Chris Dominey and Christopher Lapham* BL O/061/19

give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

21. The Opponent argues that the respective marks include “undeniably identical and highly similar elements” visually, aurally and conceptually leading to the same overall impression. In particular the Opponent submits that the marks are dominated by the element “ALL STAR/S” and due to the font, styling, and overall shape of the marks including highly similar if not identical characteristics, these would lead to a likelihood of confusion.

22. The Applicant on the other hand submits that:

“I disagree that our logo is similar to that of the Opponent. The actual design of our logo is much more complex. Its specific to our business as in it states what we do which is burgers, shakes, fries. Even on paper our design and layout of our logo is different to that of the opponent and in person it is even more unique as it is a 3D sign. The colours in our logo also set us apart from the opponent where they have one solid colour we have 3, so that’s another differentiation. I don’t understand how the opponent can see a similarity, all 3 variations of their logo look nothing alike our 1 unique logo. There are differences in design, layout and colour.”

23. The respective trade marks are shown below:

Applicant's Mark	Opponent's marks
	<p data-bbox="906 344 1040 376"><u>Mark 807</u></p>  <p data-bbox="906 786 1040 817"><u>Mark 757</u></p>  <p data-bbox="916 1055 1203 1077">EAT + DRINK + BOWL</p> <p data-bbox="906 1205 1040 1236"><u>Mark 344</u></p> 

Mark 807

24. Mark 807 consists of the words All Star presented one above the other, in a white stylised font on a black circular background. The word LANES appears underneath, presented in capitals in considerably smaller font. There is also a star device element. The overall impression and the dominant element of the mark is weighted in favour of the words All Star due to their size and position within the mark. Whilst the circular background contributes to the overall impression it plays a lesser role. The word

LANES will also play a lesser role due to its smaller font and its position at the bottom of the mark. The star will be seen as decorative and therefore makes a limited contribution to the overall impression.

Mark 757

25. The entirety of mark 807 is included within mark 757 but with the additional words EAT DRINK BOWL presented underneath. Each word is separated by a small star. As with mark 807 the dominant element of mark 757 resides with the words All Star. The words EAT DRINK BOWL contribute to the mark but play a lesser role due to their size and position and the fact that they simply describe the nature of the services offered by the undertaking. Similarly, the use of the stars will play a limited role as they will be seen as decorative.

Mark 344

26. Mark 344 consists of the words All Star presented in an arc in a black stylised emboldened font. The word LANES is presented underneath in smaller lettering, in between two small stars. The mark is dominated by the words All Star due to their size and position. The word LANES and the stars contribute to the mark but play a lesser role due to their size and position.

27. The Applicant's mark comprises of the words All Stars presented in red in a stylised font, on a black circular background. The circular device has a red border with a grey star at its centre. Two white stars appear, in the middle and the end of, the words All Stars. Around the edge of the circular device are the words SHAKES BURGERS FRIES CHURROS DONUTS WAFFLES. The overall impression of the mark lies in the words All Stars which dominate the mark due to their position and size. The additional word elements describe the type of food and drink on offer and due to their size and position will play a lesser role. The colour combination, stars, circular background and stylisation whilst contributing to the overall impression will play a lesser role.

Visual Comparison

The Opponent's 807 mark

28. The Opponent's 807 mark and the Applicant's mark are dominated by the highly similar stylised words All Star/All Stars albeit the word Star in the Applicant's mark is in the plural format. The difference with the letter "s" however is likely to go unnoticed by the average consumer. In addition, both marks coincide with the presence of a circular background and decorative stars. The respective marks differ in so far as each mark has additional words which are absent in the other's in considerably smaller font; the words "SHAKES BURGERS FRIES CHURROS DONUTS WAFFLES" are present in the Applicant's mark whilst the word "LANES" is present in the Opponent's. Whilst the Applicant submits that "the colours in our logo also set us apart from the opponent where they have one solid colour we have 3", I do not place any great reliance on the colour combination used in the Applicant's mark because, despite being registered in black and white, the Opponent's trade mark could be used in any colour combination including the same ones as the Applicant's.⁵ Balancing the visual similarities and differences I consider that the degree of visual similarity between the marks is reasonably high.

The Opponent's 757 mark

29. The Opponent's 757 mark and the Applicant's mark share the same similarities and differences as outlined in paragraph 28 above, save for the inclusion of the additional words EAT DRINK BOWL underneath the circular device in the Opponent's mark. For the same reasons I consider the visual similarities to be reasonably high due to respective marks being dominated by the words All Star/All Stars presented on a circular background.

⁵ *Specsavers International Healthcare Limited & Others v Asda Stores Limited* [2014] C-252/12

The Opponent's 344 mark

30. The only point of visual similarity resides with the stylised words All Star/All Stars. They differ in that these words are presented in an arc in the Opponent's mark and in the Applicant's mark includes a letter "s". The Opponent's mark also includes the word LANES which is absent from the Applicant's mark. Whilst both marks include decorative stars they are larger and more prominent in the Applicant's mark. The remaining elements in the Applicant's mark, as has already been noted, are absent from the Opponent's mark and therefore this is another point of visual difference. Again, no great reliance is placed on the colours used in the Applicant's mark. Overall, I consider that the respective marks share a low to medium degree of visual similarity.

Aural Comparison

The Opponent's 757 mark

31. The aural similarities lie in the words All Star which are identical. The aural difference lies with the additional letter "s" at the end of the word Star and the additional verbal elements as outlined in paragraphs 28 and 29 above. I do not consider that these remaining verbal elements will be articulated in either mark because they are descriptive of the services provided by the respective undertakings. No pronunciation will be afforded to the decorative/figurative elements. If the additional verbal elements are not articulated then the marks are aurally almost identical otherwise the marks will be aurally similar to a low to medium degree.

The Opponent's 344 and 807 mark

32. Other than the letter "s" at the end of the word Star the element All Star/s will be aurally almost identical. For the same reasons as noted above, neither the additional verbal or decorative elements will be articulated. I consider the aural similarity between the marks is medium if all the verbal elements are articulated or almost identical otherwise.

Conceptual Comparison

The Opponent's 757 mark

33. The Applicant submits that the design of the logo is specific to their business alluding to what they do “which is burger, shakes and fries”. The Opponent submits that the respective marks evoke the same conceptual idea and that the element All Star has a known meaning in the English language namely a star performer or is indicative of an American style. Both marks are dominated by the words All Star/s which whilst not directly descriptive, would be viewed as coined from American culture to describe a group of people excelling within their particular field ie “All Star team”. The remaining words “SHAKES BURGERS FRIES CHURROS DONUTS WAFFLES” in the Applicant’s mark will simply describe the type of food/services on offer, whereas the words “LANES EAT DRINK BOWL” in the Opponent’s mark will refer to the services and additionally be viewed as a reference to ten pin bowling. Overall, I consider that the marks share a reasonably high degree of conceptual similarity.

The Opponent's 344 and 807 mark

34. The absence of the words EAT DRINK BOWL and the roundel do not alter my assessment of the conceptual comparison as outlined above which is dominated by the words All Star. LANES will not be directly descriptive of the services but it will allude to the type of activity offered. On this basis the conceptual comparison between the marks is still reasonably high since the dominant component in both marks is the words All Star/s.

Distinctive character of the earlier marks

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

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

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

36. Registered trademarks possess varying degrees of inherent distinctive character; descriptive words tend to have a low level of inherent distinctiveness, whereas invented words are regarded as possessing a high level of distinctive character and dictionary words that are neither descriptive nor allusive are somewhere in the middle. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion. The Opponent has not pleaded that the distinctiveness of its mark has been enhanced through use nor has it filed evidence to support such a claim and therefore I am only able to consider the position based on inherent characteristics.

37. The distinctive character of the Opponent’s 757 mark is influenced primarily by the words All Star but I do not ignore the impact of the additional elements. The

additional words EAT DRINK BOWL and LANES will allude to and be descriptive of the nature of the services on offer and therefore their impact upon the mark is less dominant because of this and because of their relative size within the mark. The circular device and star add some additional distinctiveness to the mark but not considerably so. Overall, I consider the inherent distinctiveness of the Opponent's mark as a whole is no more than average.

38. As to the Opponent's 344 and 807 marks, the dominant aspect (being the common element) are the words All Star. The additional word LANES, alludes to the activity provided especially for bowling alley services. Again, whilst the circular device and the star add some additional distinctiveness to mark 807 overall both marks are inherently distinctive to an average degree.

Likelihood of Confusion

39. When considering whether there is a likelihood of confusion between the two marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective services originate from the same or related source.

40. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later

mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark, I conclude that it is another brand of the owner of the earlier mark.”

41. A number of factors must also be borne in mind when undertaking the assessment of confusion. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is also necessary for me to keep in mind a global assessment of all relevant factors when undertaking the comparison and that the purpose of a trade mark is to distinguish the goods and services of one undertaking from another. In doing so, I must consider that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

42. I have identified the average consumer to be a member of the general public, who would primarily select the services via visual means but with aural considerations not being discounted. I have found an average level of attention will be paid during the selection process. In so far as marks 757 and 807 are concerned I have found the respective trade marks to be visually similar to a reasonably high degree and in relation to the Opponent’s 344 mark between low and medium. Aurally where only the All Star/All Stars element is articulated the similarity with all the Opponent’s marks is almost identical or otherwise at least medium (for marks 807 and 344) and low to medium (for the 757 mark). Conceptually I have found that the marks share a reasonably high degree of similarity. I have also found the Opponent’s marks to have an average degree of inherent distinctive character. I bear in mind my assessment with regards the overall impression of each mark and take into account the distinctiveness of the common element within the marks as a whole.⁶

⁶ *Kurt Geiger v A-List Corporate Limited*, BL O-075-13

43. All the respective marks are dominated by the words “All Star/s” and it is these words which will be retained in the mind of the average consumer and by which the contested marks will be referred. Whilst not discounting the differences between the respective marks, broadly speaking the Applicant’s mark and the Opponent’s 757 and 807 marks contain similar elements namely a circular background, stars and additional verbal elements descriptive of the services provided. Taking into account the principle of imperfect recollection and the fact that the consumer rarely has a chance to compare marks side by side I conclude that there is a strong likelihood that the Applicant’s mark will be mistaken for the Opponent’s earlier marks. The circular background in combination with the words are highly similar and the differences between the visual and aural characteristics of the marks are not sufficient to distinguish between them particularly since the respective services are identical and chosen primarily through visual means. It is my view that the average consumer will mistake one mark for the other leading to a likelihood of direct confusion.

44. In relation to the Opponent’s 344 mark I do not consider that the marks will be directly mistaken one for the other, due to the number of additional elements present in the Applicant’s mark, particularly since the purchasing process is dominated by visual considerations. However, the average consumer having noticed the differences may conclude that the marks and therefore the services originate from the same or related undertaking as a result of the dominant and distinctive All Star element. In my view this would lead to a likelihood of indirect confusion between the Applicant’s mark and the Opponent’s 344 mark.

Outcome

45. The opposition under section 5(2)(b) of the Act succeeds in full. Subject to any successful appeal, the application is refused.

Costs

46. As the Opponent has been successful it is entitled to a contribution toward its costs. Award of costs in proceedings are based upon the scale as set out in Tribunal Practice Note 2 of 2016. Applying that guidance, I award costs to the Opponent on the following basis:

Preparing a notice of opposition and reviewing the counterstatement:	£200
Preparing submissions in lieu of hearing	£300
Official fee:	£100
Total:	£600

47. I order Samera Hussain to pay All Star Leisure (Group) Limited the sum of £600 as a contribution towards its costs. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated this 20th day of February 2020

Leisa Davies

For the Registrar