

O-076-21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NOS 3347382 & 3347331

BY ANDREW HART

AND

IN THE MATTER OF OPPOSITIONS THERETO

UNDER NOS 415433 & 415498

BY DAVID MICHAELS

Background and pleadings

1. These consolidated proceedings concern two trade mark applications which, following assignments, now stand in the name of Andrew Hart. The applications are opposed by David Michaels.
2. The first opposition concerns trade mark application number 3347382 for the mark shown below (“UK382”):



The application was filed on 22 October 2018 and published on 9 November 2018 for a range of services in class 43. The full specification is shown at annexe A to this decision.

3. A notice of opposition was filed on 11 February 2019. The opposition is based on ss. 5(1), 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and it is directed against all of the services in the application. Mr Michaels relies upon the earlier trade marks shown below:

- (i) European Union trade mark (“EUTM”) number 8458846 (“EU846”):¹



¹ Although the UK has left the EU and the EUTMs relied upon by Mr Michaels now enjoy protection in the UK as comparable trade marks, the EUTMs remain the relevant rights in these proceedings. That is because the applications were filed before the end of the Implementation Period and, under the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, I am obliged to decide the oppositions on the basis of the law as it stood at the date of application.

Filing date: 29 July 2009; date of registration: 18 June 2010.

Registered for goods and services in classes 25, 29, 30 and 43, all of which are relied upon. The specification is listed in full at annexe B to this decision;

(ii) EUTM 8458812 **MAKING THE WORLD A BURGER PLACE** (“EU812”)

Filing date: 29 July 2009; date of registration: 18 June 2010.

Registered for goods and services in classes 25, 29, 30 & 43, all of which are relied upon. The specification is identical to that of EU846 and is listed at annexe B;

4. The second trade mark application with which these proceedings are concerned is application number 3347331 for the trade mark shown below:



The mark was filed on 22 October 2018 and was published on 16 November 2018 in respect of services in class 43. The full specification is listed at annexe A to this decision.

5. The notice of opposition against this trade mark was filed on 18 February 2019. The opposition is based upon ss. 5(1), 5(2)(a) and 5(2)(b) and is directed against all of the services in the contested trade mark application. In this opposition, Mr Michaels relies upon EU846 (see details at paragraph 3(i), above), along with all of the goods and services for which the mark is registered.

6. The claims under the relevant grounds are not materially different in the two oppositions. They are that the marks and the goods/services are identical, or that because the marks are identical or similar and the goods and services are identical or similar, there is a likelihood of confusion, including the likelihood of association.

7. Mr Hart filed counterstatements in both oppositions. Both counterstatements include assertions that:

- (i) Mr Michaels is an undischarged bankrupt and cannot own assets in the UK;
- (ii) Mr Michaels gave the original applicant (DA Bite Me Ltd) and/or Mr Hart “permission to do what it wants with any IP/Trade mark”/permission to use the marks with no conditions attached.

In the counterstatement for UK382, Mr Hart also points out that he is the joint owner of the EUTMS on which Mr Michaels relies.

8. Given their dates of filing, the trade marks relied upon by Mr Michaels qualify as earlier marks in accordance with s. 6 of the Act. In his notices of opposition, Mr Michaels provided a statement that the marks have been used for all of the goods and services relied upon. This statement is made because the marks had completed their registration procedure more than five years before the filing date of the applications in suit and they are, therefore, subject to the proof of use provisions contained in s. 6A of the Act. Although text was entered in the boxes concerning proper reasons for non-use, it amounts to allegations that Mr Hart is seeking to register a mark already in use and registered and that UK382 combines the earlier marks, as well as claims to identity/similarity between the marks. None of these reasons offers an explanation as to why Mr Michaels has been unable to make genuine use of the trade marks upon which he relies in the relevant five-year period. Accordingly, I proceed on the basis that there is no pleaded claim to proper reasons for non-use.

9. In his counterstatements, Mr Hart requested that Mr Michaels make good his claim to genuine use of the trade marks. The relevant period for assessing genuine use in both oppositions is 23 October 2013 to 22 October 2018.

10. Both parties filed evidence. A hearing was requested and was held before me by videoconference on 16 December 2020. Both parties are litigants in person and both attended the hearing remotely, although Mr Hart was approximately fifteen minutes late in joining. There was a suggestion that Mr Hart had not received the link to the

appointment but the official file appears to show that it was sent to his email address of record on 11 December 2020. In any event, I am satisfied that any material issues discussed prior to his joining were revisited later in the hearing and that he had the opportunity to address me on those points.

Case management

11. At the hearing, both parties made requests for permission to file further evidence.

12. The factors to be considered in determining an application to file late evidence were considered in *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch) and are:

i) The materiality of the evidence in question to the issues that the Registrar has to determine;

ii) The justice and fairness of subjecting the opposite party to the burden of the evidence in question at the stage that the registry proceedings have reached, including the reasons why the evidence was not filed earlier;

iii) Whether the admission of the further evidence would prejudice the opposite party in ways that cannot be compensated for in costs (e.g. excessive delays);
and

iv) The fairness to the applicant of excluding the evidence in question, including prejudice to the applicant if it is unable to rely on such evidence.

Mr Hart's request

13. Mr Hart's request to file further evidence arose because of a query from the tribunal. It is necessary for me to address this briefly. The tribunal wrote to Mr Hart on 8 December 2020 requesting that he amend his witness statement of 24 February 2020 because two exhibits (7 and 9) were not mentioned. On inspection of the file, it seems that the tribunal did originally accept that the evidence was in an acceptable format and confirmed that

those exhibits were admitted in correspondence with the parties. Although the exhibits at issue are not referenced in the body of the statement, there is, at the end of Mr Hart's witness statement, after the statement of truth and signature, a separate page, headed "witness statement" but really a schedule of exhibits, which mentions both exhibit 7 and exhibit 9. This page contains a statement of truth and Mr Hart's signature. Although not in the usual format and not page numbered so as to make it absolutely clear that it is part of the witness statement, I see no basis on which to disregard the exhibits referenced in the document and I will take them into account.

14. Mr Hart filed additional evidence on 10 December 2020 and sought its admission at the hearing. The evidence consists of a witness statement, with another schedule of exhibits, plus two additional exhibits. The witness statement is identical to his first statement, save for the last paragraph; the exhibits are records printed from the trade mark Register and from Companies House. An issue arises with the signature on this statement because it is at page 5, on the schedule of exhibits; the amended final paragraph is at page 6 and is not signed. I need not, however, dwell on this. At the hearing, Mr Michaels questioned the relevance of the amended evidence. Mr Hart said that he had provided it for clarification and that he did not think it would change the outcome. The parties were content for me to consider the evidence *de bene esse*. The prints from public registers could have been obtained much earlier but, more pertinently, none of the additional evidence is material to these proceedings. My decision is to refuse to admit the evidence.

Mr Michaels' request

15. In the course of his submissions at the hearing, prompted by a question from me as to the evidence which showed his use of the earlier marks, Mr Michaels made an application to file additional evidence. He wished to file evidence showing use from 2017, particularly in respect of franchises he operated in Marlborough and Southampton. This evidence would, Mr Michaels said, consist of documents such as franchise agreements, contracts between the parties and social media accounts. Mr Michaels said that this

evidence would not take long to put together. I refused the request at the hearing for the following reasons:

- The opponent bears the burden of proof. Whilst allowances may be made for a litigant in person's unfamiliarity with rules and procedures, unfamiliarity itself does not absolve a party from all responsibility to make their case within normal procedures, particularly when that party is the complainant. Proof of use was clearly requested and Mr Michaels has had ample opportunity to file evidence to support his case;
- Whilst evidence of the type which Mr Michaels sought to file may have had an important effect on the case, there was no evidence before me: only a general description was provided and there was, therefore, no way for me to make a proper assessment of the effect on the case of the evidence which may eventually be forthcoming;
- The request was filed at a very late stage of proceedings and would, in effect, take them back to the beginning. Since no evidence had been provided with the request, it was unclear whether Mr Hart would wish to file evidence in response but he would at least have to be offered the opportunity. The delay would be significant.

Although a refusal to allow late evidence was likely to have a material impact on the outcome of these oppositions and was considerably to Mr Michaels' disadvantage, I considered this outweighed by the other factors outlined above. I would add that, although a multiplicity of proceedings is to be avoided, opposition proceedings do not create an issue estoppel,² so even if the oppositions were to fail and my refusal to allow Mr Michaels a further opportunity to file evidence were upheld on appeal, nothing would prevent Mr Michaels from seeking to invalidate the trade marks once they have become registered.

² *Special Effects Ltd v L'Oréal SA & Anor* [2007] EWCA Civ 1.

16. Following the hearing, Mr Hart sent further 'evidence' to the tribunal concerning Mr Michaels. There was no application for permission to adduce such evidence. The material provided is entirely irrelevant to the decision before me and I disregard it.

Evidence

17. I have read all of the evidence filed by the parties. Not all of it is relevant and I will only set out here the evidence pertinent to the decision before me.

Mr Michaels' evidence

18. This consists of a witness statement from Mr Michaels. He says that he has been using the earlier marks, including by licensing them to others, since 2009. He admits that he entered into a licence agreement with Bite Me Burger Co Ltd, a company run by Mr Hart, in June 2017. He states that he agreed to assign the trade marks to Mr Hart's company but that this agreement was contingent on certain other events which never occurred. He also states that he terminated the agreement for various breaches on 18 October 2017.

19. A second agreement, with another of Mr Hart's companies, was entered into on 9 November 2018. This concerned joint ownership of the earlier trade marks. Mr Michaels makes various submissions about the ownership of these marks and the potential for confusion if the contested trade marks are registered. However, I do not need to address this further, as Mr Michaels remains recorded as a joint owner of the earlier trade marks.

Mr Hart's evidence

20. Mr Hart provided a witness statement in his own name with accompanying exhibits.

21. Mr Hart says that Mr Michaels uses other names, including Simon Levy. Two articles from HBG, one of which is dated 12 August 2013, report the imprisonment of "Simon Levy aka David Michaels" and the prohibition on his acting as a company director.³ A print from

³ Exhibit 5.

Companies House shows the disqualification of Simon Levy because of his conviction on an indictable offence, the period of such disqualification being 23 July 2013 to 22 July 2028.⁴ The address for Mr Levy is appears to be the same as that of the David Michaels recorded as representative in this case (although there is a minor discrepancy in the street names, the postcode is the same). There are also prints from the Insolvency Service register which record bankruptcy cases in 1998 and 2007 against David Michaels.⁵ The records were printed in August 2019 and show that at that date the discharge was suspended indefinitely. Neither of the addresses for Mr Michaels in these prints corresponds to the addresses given for the applicant and representative in these proceedings or that of David Michaels on the EUIPO register.

22. There is also correspondence from Mr Michaels to Mr Hart and others dated 20 October 2017 in which Mr Michaels purports to terminate a licence agreement on the grounds that there have been multiple breaches.⁶ The nature of the breaches has been redacted.

23. A copy of an agreement dated 9 November 2017 between Mr Michaels and Mr Hart is in evidence.⁷ It transfers 50% of the ownership of the earlier marks from Mr Michaels to Mr Hart.

24. There is email correspondence between Mr Hart and various individuals concerning the non-payment of an invoice for a large number of burgers and enquiries into the placing of the order.⁸ There is also in evidence an email dated 2 October 2017 from Mr Michaels to Mr Hart, which appears to enclose a list of paid and outstanding payments from August and September 2017.⁹ The amounts paid/payable total £14,702.84. However, handwritten alongside a number of the outstanding amounts is the word “fake”. Without these “fake” payments, the total is £5,576.80. The exhibit also includes copies of invoices dated August 2017, most of which correspond to those labelled “fake” on the payment

⁴ Exhibit 6.

⁵ Exhibit 11.

⁶ Exhibit 2.

⁷ Exhibit 10.

⁸ Exhibits 1, 8

⁹ Exhibit 3.

schedule. The invoices which do not correspond to “fake” payments are an invoice to Work Life for £118 (9 August 2017) and another to Select for £88 (2 August 2017). There is also an invoice to We Work for £352 dated 24 August 2017, which does not appear on the schedule, though I note a “fake” payment record for the same amount dated 21 August. The invoices show UK382 at the top of the page and are to four different customers in London.

Preliminary issues and approach

25. In the course of these proceedings, a number of accusations have been made about Mr Michaels’ conduct. Most of them are not relevant to the decision I have to make. This tribunal has a narrow scope of enquiry, concerned only with whether Mr Hart’s trade marks may be registered. The grounds of opposition which have been raised regard whether there is identity or similarity between the trade marks, whether there is identity or similarity between the respective lists of goods and services and whether, when all of the relevant factors, such as the characteristics of the average consumer, are taken into account, there is a likelihood of confusion. Those grounds do not require me to make an assessment of either party’s behaviour or character and I do not intend to do so.

26. David Michaels is the name of both the opponent and his representative in these proceedings but different addresses are given for each. The addresses are different from the address on the EUIPO register for David Michaels, the (joint) owner of the EUTMs. The point has not been taken by either party. Mr Hart appears to accept that the opponent in these proceedings is the same individual as the owner of record of the EUTMs. There has also been no suggestion, including at the hearing, that David Michaels, the opponent, and David Michaels, the opponent’s representative, are not one and the same person. I proceed on the basis that all of these names concern the same individual.

27. Mr Hart has alleged that Mr Michaels is an undischarged bankrupt. This allegation is of relevance because Mr Hart alleges that, as a consequence of his bankruptcy, Mr Michaels is not entitled to own property. As a trade mark is a property right, the allegation calls into question the ability of Mr Michaels to claim ownership and raises the question

of whether any opposition proceeding should have been brought by Mr Michaels' trustee in bankruptcy rather than Mr Michaels. I have some concerns about the evidence provided by Mr Hart, as the address given for the individual on the Insolvency Service prints is not the same any of the addresses used by Mr Michaels in connection with these proceedings. However, Mr Michaels has made no attempt to deny the allegation that he is subject to a bankruptcy order. Indeed, at the hearing (at which there was no cross-examination), Mr Michaels appeared to accept that he is subject to such an order, submitting that contracts may be entered into under a bankruptcy order if it is reported to the trustee.

28. There is no evidence before me of whether trade marks are routinely considered exempt assets under the bankruptcy rules, whether there has been an exemption in Mr Michaels' case or whether the operation of bankruptcy rules would mean that Mr Michaels may remain the recorded owner of the trade marks but that any contentious proceedings would be undertaken with the permission of the trustee in bankruptcy, a fact which may not be evident from the public trade mark records. It seems to me very unlikely that a trade mark, being intangible property, would be treated as an exempt asset under the bankruptcy rules. It also seems unlikely that a bankrupt would be entitled to launch court proceedings, which may result in an adverse award of costs, without permission from the trustee in bankruptcy. It may be that Mr Michaels has such permission, it may not: there is nothing in any of the papers to assist me either way. However, Mr Michaels is a recorded owner according to the register and there is nothing to suggest that any attempt has been made to replace Mr Michaels with the trustee in bankruptcy at any point. I will proceed on the basis that Mr Michaels may bring the oppositions, as he is, prima facie, one of the recorded owners of the trade marks. As will become apparent, I do not need to express a concluded view on the matter in order to decide the present oppositions.

Proof of Use

29. The proof of use provisions are at s. 6A of the Act, which reads:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services”.

30. Section 100 is also relevant and states as follows:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it”.

31. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:¹⁰

“114. [...] The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: *Case C-40/01 Ansul BV v Ajax Brandbeveiliging BV*

¹⁰ Although the UK has left the EU, section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. That is why this decision continues to refer to the case law of the EU courts on trade mark matters.

[2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)*
[2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient

to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32]”.

32. In *PLYMOUTH LIFE CENTRE Trade Mark*, BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use [...]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public”.

33. In *CATWALK Trade Mark*, BL O/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed

in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘*show*’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use”.

34. Whether there has been genuine use of a trade mark depends on a number of factors. One of the ways in which a trade mark can potentially be used is with, or as part of, another trade mark. The case law concerning such use is found in *Colloseum Holdings*

AG v Levi Strauss & Co., Case C-12/12, EU:C:2013:253. In that case, the Court of Justice of the European Union (“CJEU”) found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)" [emphasis added].

35. It is also possible that minor variations of a trade mark may constitute genuine use, provided that the alterations do not alter the distinctive character of the trade mark. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was), as the Appointed Person, summarised the test for 'variant' use, i.e. use complying with s.46(2) of the Act, as follows:

"33. [...] The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period [...].

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all".

36. Although *Nirvana* was decided before the judgment in *Colloseum*, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.

37. Mr Michaels asserts in evidence that he has been using the earlier marks since, variously, 2009 and 2017 but he has filed no supporting evidence of that claim. No

documentary evidence showing any use which may have been made of the marks, such as invoices, advertising material, menus or website presence/sales catalogues, is exhibited, nor are any figures (e.g. turnover, advertising) provided. Mr Michaels' evidence is wholly inadequate to support a finding that the marks have been put to genuine use. However, some evidence has been filed by Mr Hart. Although Mr Hart put Mr Michaels to proof, and the burden remains on Mr Michaels, I consider that it would be wrong for me to ignore potential evidence of use simply because it was filed, against his own interests, by Mr Hart.

38. The evidence filed by Mr Hart includes evidence of payments due and invoices from August 2017, which is within the relevant period. The payments which appear to be accepted as genuine total £5,576.80 (or, if the 24 August invoice to We Work is included, £5,928.80). As Mr Michaels has admitted that he had a licence agreement with Mr Hart between June 2017 and October 2017, it can be inferred that the use was with Mr Michaels' consent. The mark which has been used on the invoices is UK382.

39. I will consider first whether the mark as used is acceptable use of the earlier marks either as elements in a composite mark or as an acceptable variant of the registered mark. EU846 consists of the words "Bite Me" in a stylised, shaded typeface, with the tail from the final "e" curling back and underlining those words. The words "BURGER CO." are within the underlining. The mark as used on the invoices in the evidence contains EU846 in a typeface which differs only in that the letters have no shading and are presented in a solid colour. I do not consider this to be a change which alters the distinctive character of the trade mark: the mark is dominated by the words "Bite Me BURGER CO.", all of which are present in the mark as used. The change of colour does not affect the dominant verbal elements and, in my view, has no material impact on the distinctiveness of the mark as a whole. The use of EU846 above the words "MAKING THE WORLD A BURGER PLACE" (i.e. EU812) as part of a composite mark does not affect the origin function of EU846, or vice versa. The mark as used on the invoices is acceptable variant use of EU846 and acceptable composite use of both of the earlier trade marks.

40. The next step is to determine whether the level of use which has been shown is sufficient. Genuine use is not a test of a company's economic success but I must, as the case law above shows, be satisfied that the use which has been shown is warranted in the sector concerned. In *Naazneen Investments Ltd v OHIM*, Case T-250/13, the General Court upheld a decision by the OHIM (now EUIPO) Board of Appeal that the sale of EUR 800-worth of non-alcoholic beverages under a mark over a 5-year period, which had been accepted as not purely to maintain the trade mark registration, was insufficient, in the economic sector concerned, for the purposes of maintaining or creating market share for the goods covered by that Community trade mark. The use was therefore not genuine use. In *JUMPMAN Trade Mark*, BL O/222/16, the Appointed Person upheld a hearing officer's finding that sales of around 55,000 pairs of trainers over a 16-month period were insufficient to qualify as genuine use.

41. In the instant case, no turnover figures are given. There is no evidence of either advertising material or advertising spend over the relevant period. The specifications relied upon are wide-ranging but the only goods referred to at all in the evidence are burgers (in the context of allegations of theft). Given the customers listed in Mr Hart's evidence (e.g. GQ and Arcadia), most likely this means retail sales of burgers in buns, though there is no express statement to that effect. The evidence of sales totals under £6,000 to four customers in London in August/early September 2017. I accept that there is some evidence of repeat custom and that there is nothing to indicate the sales are sham. However, the burgers appear to have been sold at £44/dozen, which would mean around 1,600 burgers. Even taking only the fast food sector, the marketplace is still likely to be huge. 1,600 burgers is a vanishingly small figure and £6,000 likely to represent only a tiny fraction of the market. The sales are also in a limited geographical area, which does not assist in painting a picture of real market penetration. In the absence of any other evidence, I find that genuine use is not made out.

42. Mr Michaels has failed to establish genuine use of either of the earlier marks within the relevant period. The oppositions fall at the first hurdle and are dismissed accordingly.

Conclusion

43. The oppositions have failed. The applications will proceed to registration.

Costs

44. Mr Hart has been successful and is entitled to an award of costs. He has requested costs, on the appropriate form, to compensate him for 52 hours' work, consisting of 5 hours for considering the notices of opposition and preparing a counterstatement, 46 hours for the preparation of evidence, including further evidence, correspondence and telephone calls, and one hour preparation time for the hearing. Unless there are reasons why another approach may be appropriate, the tribunal awards costs on a contributory rather than compensatory basis. I see no reason to depart from this principle here. The Litigants in Person (Costs and Expenses) Act 1975, the Civil Procedure Rules Part 46 and the associated Practice Direction set the amount payable to litigants in person at £19 per hour.

45. I accept that, as a litigant in person, Mr Hart will have spent time familiarising himself with the relevant law and issues in the case. His estimate of the time taken to consider the notices of opposition and prepare the defence is reasonable, as is the preparation time for the hearing. However, whilst it will have taken Mr Hart some time to prepare his evidence, his estimate of 46 hours to consider Mr Michaels' very brief statement and to prepare his own light evidence strikes me as excessive. It should be noted that Mr Michaels cannot be expected to pay for Mr Hart's time in remedying deficiencies in his own evidence. With these factors in mind, I award costs to Mr Hart on the following basis:

Considering the notices of opposition and filing the counterstatements (5 hours):	£95
Considering the other party's evidence and filing evidence (16 hours):	£304
Preparing for and attending a hearing (2 hours):	£38
Total:	£437

46. I order David Michaels to pay Andrew Hart the sum of **£437**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 3rd day of February 2021

**Heather Harrison
For the Registrar
The Comptroller-General**

ANNEXE A

UK3347382

Class 43: Agency services for reservation of restaurants; Arranging of meals in hotels; Arranging of wedding receptions [food and drink]; Arranging of wedding receptions [venues]; Banqueting services; Bar and restaurant services; Bar information services; Bar services; Bars; Beer bar services; Beer garden services; Bistro services; Booking of restaurant seats; Brasserie services; Business catering services; Café services; Cafe services; Cafés; Cafeteria services; Cafeterias; Campground facilities (Providing -); Canteen services; Canteens; Carry-out restaurants; Carvery restaurant services; Catering; Catering (Food and drink -); Catering for the provision of food and beverages; Catering for the provision of food and drink; Catering in fast-food cafeterias; Catering of food and drink; Catering of food and drinks; Catering services; Catering services for company cafeterias; Catering services for conference centers; Catering services for educational establishments; Catering services for hospitality suites; Catering services for hospitals; Catering services for nursing homes; Catering services for providing European-style cuisine; Catering services for retirement homes; Catering services for schools; Catering services for the provision of food; Catering services for the provision of food and drink; Catering services specialised in cutting ham by hand, for fairs, tastings and public events; Catering services specialised in cutting ham by hand, for weddings and private events; Catering services specialising in cutting ham for fairs, tastings and public events; Catering services specialising in cutting ham for weddings and private events; Charitable services, namely providing food and drink catering; Club services for the provision of food and drink; Cocktail lounge buffets; Coffee bar services; Coffee shop services; Coffee shops; Coffee supply services for offices [provision of beverages]; Consultancy services in the field of food and drink catering; Consultancy services relating to food; Consultancy services relating to food preparation; Contract food services; Corporate hospitality (provision of food and drink); Decorating of food; Delicatessens [restaurants]; Fast food restaurants; Fast-food restaurant services; Food and drink catering; Food and drink catering for banquets; Food and drink catering for cocktail parties; Food and drink catering for institutions; Food and drink preparation services; Food preparation; Food preparation

for others on an outsourcing basis; Food preparation services; Grill restaurants; Hotel catering services; Ice cream parlors; Ice cream parlour services; Information and advice in relation to the preparation of meals; Juice bar services; Juice bars; Marquee hire; Mobile catering; Mobile catering services; Mobile restaurant services; Night club services [provision of food]; Organisation of catering for birthday parties; Outside catering; Outside catering services; Personal chef services; Preparation and provision of food and drink for immediate consumption; Preparation of food and beverages; Preparation of food and drink; Preparation of meals; Providing banquet and social function facilities for special occasions; Providing drink services; Providing food and beverages; Providing food and drink catering services for convention facilities; Providing food and drink catering services for exhibition facilities; Providing food and drink catering services for fair and exhibition facilities; Providing food and drink for guests; Providing food and drink for guests in restaurants; Providing food and drink in bistros; Providing food and drink in doughnut shops; Providing food and drink in Internet cafes; Providing food and drink in restaurants and bars; Providing of food and drink; Providing of food and drink via a mobile truck; Providing personalized meal planning services via a website; Providing restaurant services; Providing reviews of restaurants; Providing reviews of restaurants and bars; Providing room reservation and hotel reservation services; Provision of food and beverages; Provision of food and drink; Provision of food and drink in restaurants; Provision of information relating to the preparation of food and drink; Pubs; Reservation and booking services for restaurants and meals; Reservation of restaurants; Reservation services for booking meals; Restaurant and bar services; Restaurant reservation services; Restaurant services; Restaurant services for the provision of fast food; Restaurant services incorporating licensed bar facilities; Restaurant services provided by hotels; Restaurants; Restaurants (Self-service -); Salad bars; Salad bars [restaurant services]; Self-service cafeteria services; Self-service restaurant services; Self-service restaurants; Services for providing food and drink; Services for the preparation of food and drink; Services for the provision of food and drink; Serving beverages in brewpubs; Serving food and drink for guests; Serving food and drink for guests in restaurants; Serving food and drink in doughnut shops; Serving food and drink in Internet cafes; Serving food and drink in restaurants and bars; Serving food and drinks; Serving of

alcoholic beverages; Snack bar services; Snack-bar services; Snackbars; Snack-bars; Sommelier services; Supplying meals to the homeless or underprivileged; Supplying of meals for immediate consumption; Take away food and drink services; Take away food services; Take-away fast food services; Takeaway food and drink services; Take-away food and drink services; Takeaway food services; Take-away food services; Takeaway services; Take-out restaurant services; Tourist restaurants; Travel agency services for booking restaurants; Wine bar services; Wine bars; Wine tasting services (provision of beverages). Agency services for reservation of restaurants; Arranging of meals in hotels; Arranging of wedding receptions [food and drink]; Arranging of wedding receptions [venues]; Banqueting services; Bar and restaurant services; Bar information services; Bar services; Bars; Beer bar services; Beer garden services; Bistro services; Booking of restaurant seats; Brasserie services; Business catering services; Café services; Cafe services; Cafés; Cafeteria services; Cafeterias; Campground facilities (Providing -); Canteen services; Canteens; Carry-out restaurants; Carvery restaurant services; Catering; Catering (Food and drink -); Catering for the provision of food and beverages; Catering for the provision of food and drink; Catering in fast-food cafeterias; Catering of food and drink; Catering of food and drinks; Catering services; Catering services for company cafeterias; Catering services for conference centers; Catering services for educational establishments; Catering services for hospitality suites; Catering services for hospitals; Catering services for nursing homes; Catering services for providing European-style cuisine; Catering services for retirement homes; Catering services for schools; Catering services for the provision of food; Catering services for the provision of food and drink; Catering services specialised in cutting ham by hand, for fairs, tastings and public events; Catering services specialised in cutting ham by hand, for weddings and private events; Catering services specialising in cutting ham for fairs, tastings and public events; Catering services specialising in cutting ham for weddings and private events; Charitable services, namely providing food and drink catering; Club services for the provision of food and drink; Cocktail lounge buffets; Coffee bar services; Coffee shop services; Coffee shops; Coffee supply services for offices [provision of beverages]; Consultancy services in the field of food and drink catering; Consultancy services relating to food; Consultancy services relating to food preparation; Contract food services; Corporate hospitality

(provision of food and drink); Decorating of food; Delicatessens [restaurants]; Fast food restaurants; Fast-food restaurant services; Food and drink catering; Food and drink catering for banquets; Food and drink catering for cocktail parties; Food and drink catering for institutions; Food and drink preparation services; Food preparation; Food preparation for others on an outsourcing basis; Food preparation services; Grill restaurants; Hotel catering services; Ice cream parlors; Ice cream parlour services; Information and advice in relation to the preparation of meals; Juice bar services; Juice bars; Marquee hire; Mobile catering; Mobile catering services; Mobile restaurant services; Night club services [provision of food]; Organisation of catering for birthday parties; Outside catering; Outside catering services; Personal chef services; Preparation and provision of food and drink for immediate consumption; Preparation of food and beverages; Preparation of food and drink; Preparation of meals; Providing banquet and social function facilities for special occasions; Providing drink services; Providing food and beverages; Providing food and drink catering services for convention facilities; Providing food and drink catering services for exhibition facilities; Providing food and drink catering services for fair and exhibition facilities; Providing food and drink for guests; Providing food and drink for guests in restaurants; Providing food and drink in bistros; Providing food and drink in doughnut shops; Providing food and drink in Internet cafes; Providing food and drink in restaurants and bars; Providing of food and drink; Providing of food and drink via a mobile truck; Providing personalized meal planning services via a website; Providing restaurant services; Providing reviews of restaurants; Providing reviews of restaurants and bars; Providing room reservation and hotel reservation services; Provision of food and beverages; Provision of food and drink; Provision of food and drink in restaurants; Provision of information relating to the preparation of food and drink; Pubs; Reservation and booking services for restaurants and meals; Reservation of restaurants; Reservation services for booking meals; Restaurant and bar services; Restaurant reservation services; Restaurant services; Restaurant services for the provision of fast food; Restaurant services incorporating licensed bar facilities; Restaurant services provided by hotels; Restaurants; Restaurants (Self-service -); Salad bars; Salad bars [restaurant services]; Self-service cafeteria services; Self-service restaurant services; Self-service restaurants; Services for providing food and drink; Services for the preparation of food

and drink; Services for the provision of food and drink; Serving beverages in brewpubs; Serving food and drink for guests; Serving food and drink for guests in restaurants; Serving food and drink in doughnut shops; Serving food and drink in Internet cafes; Serving food and drink in restaurants and bars; Serving food and drinks; Serving of alcoholic beverages; Snack bar services; Snack-bar services; Snackbars; Snack-bars; Sommelier services; Supplying meals to the homeless or underprivileged; Supplying of meals for immediate consumption; Take away food and drink services; Take away food services; Take-away fast food services; Takeaway food and drink services; Take-away food and drink services; Takeaway food services; Take-away food services; Takeaway services; Take-out restaurant services; Tourist restaurants; Travel agency services for booking restaurants; Wine bar services; Wine bars; Wine tasting services (provision of beverages).

UK3347331

Class 43: Booking of restaurant seats; Brasserie services; Business catering services; Café services; Cafe services; Cafés; Cafeteria services; Cafeterias; Carry-out restaurants; Catering; Catering (Food and drink -); Catering for the provision of food and beverages; Catering for the provision of food and drink; Catering in fast-food cafeterias; Catering of food and drink; Catering of food and drinks; Catering services; Catering services for company cafeterias; Catering services for conference centers; Catering services for educational establishments; Catering services for hospitality suites; Catering services for hospitals; Catering services for nursing homes; Catering services for providing European-style cuisine; Catering services for retirement homes; Catering services for schools; Catering services for the provision of food; Catering services for the provision of food and drink; Catering services specialised in cutting ham by hand, for fairs, tastings and public events; Catering services specialised in cutting ham by hand, for weddings and private events.

ANNEXE B

EUTM 8458846 & EUTM 8458812

Class 25: Clothing; footwear; headgear for wear; knitwear being clothing; clothing of cotton, silk, linen, wool; clothing made from man-made fibres; shirts; T-shirts, tee-shirts; long sleeved T-shirts; short sleeved T-shirts; T-shirts with graphics printed on them; men's T-shirts; women's T-shirts; children's T-shirts; T-shirts for babies; socks, stockings and hosiery; mittens; pullovers; scarves; sports jerseys; swimwear; overcoats; coats; jerseys; jumpers; tops; sweaters; cardigans; pullovers; ponchos; corsetry; scarves; shawls; mufflers; pashminas; wraparounds; wraps; gloves; socks; swimming costumes; one piece swimming costumes; aprons being clothing; boxer shorts; bikini swimming costumes; tankinis; tops; thongs; pants; bras; bodyshapers; beachwear; sarongs; leisure wear; blouses; dresses; shorts; shirts; jeans; denim jackets; denim trousers; neckties; bow ties; ties; lounge suits; waist coats; trousers; articles of lingerie; articles of underwear; pyjamas; night wear; dressing gowns; bath robes; beach robes; articles of beachwear; beach clothing; beach dresses; beach shorts; beach wraps; rain coats; sou'westers; cagoules; sportswear; boxer's shorts and vests; sports bras; sports panties; sports briefs; and jockstraps; sports pants; sports shorts; sports T-shirts; sports crop-tops; sports vests; trackpants; track suits; jogging suits; warm-up suits; running shorts; running vests; running tops; running pants; bicycling shorts; soccer shirts; soccer shorts; soccer socks; football strips; football shirts; football boots; studs for football boots; football boots for use on synthetic turf surfaces; rugby shirts; rugby shorts; rugby socks; sweatshirts; hooded tops; swimming suits being wetsuits; hats; woolly hats; caps; bobble hats; ski hats; baseball caps; cricket hats; sunhats; sun-visors; swimming caps; camisoles; caps being headwear; hats; headgear for wear; jackets; waterproof and water resistant outer garments; waterproof and water resistant outer clothes; footwear uppers; heel pieces and tips for footwear; articles of industrial and work footwear; headgear and clothing; protective and safety footwear other than for protection against injury or accident; waterproof and water resistant clothing, headwear and footwear; slippers; bath sandals and bath slippers; dance shoes; ladies shoes; leather shoes; high heeled shoes; shoes with stiletto heels; ladies shoes with heels; dancewear including footwear; beachwear

including footwear; shoes; boots; trainers; flip-flops; sandals; mules; slip on shoes; slip on boots; moccasin; loafers; deck shoes; plimsolls; Wellington boots; beach shoes; shoes for windsurfing and water sports; parts and fittings for all the aforesaid goods.

Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces being cranberry sauce; eggs, milk and milk products; edible oils and fats; prepared meals; soups and potato crisps; hot dogs; burgers; meat burgers; meat products being in the form of burgers; vegetable burgers; curry being prepared meals with or without rice; edible shelled nuts; foods prepared from fish; foods prepared from milk; prepared fruit based desserts; prepared milk based desserts; prepared olives; prepared dishes consisting principally of meat; prepared dishes consisting principally of poultry; prepared foods consisting principally of fish; prepared foods consisting principally of cheese; prepared foods consisting principally of fruits; prepared foods made principally of materials derived from leguminous matter; drinking yoghurt; drinks based predominantly on milk; prepared meat dishes; prepared meat products; prepared meat products for food for human consumption; prepared savory foodstuffs in the form of snack foods; prepared snack foods; prepared soups; flavoured milk drinks.

Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes; hot dog sandwiches; hot dogs; hot dogs sausages in a bread roll; burgers contained in bread roll; drinks prepared from chocolate; drinks prepared from cocoa; prepared pizzas; prepared pasta meals; prepared pasta dishes; foodstuffs in the form of prepared meals; foodstuffs prepared in the form of savory; snackfoods; foodstuffs in the form of prepared meals; foodstuffs prepared in the form of snacks; frozen prepared meals; prepared cocoa and cocoa-based beverages; prepared desserts; prepared coffee and coffee-based beverages; sauces, honey mustard dressing, thick buttered toasted bread; aerated beverages with coffee base; aerated beverages with cocoa base; aerated beverages with chocolate base; aerated beverages with tea base; chocolate-based beverages; cocoa-based beverages

with fruit flavoring; tea-based beverages, non-medicated; non-medicated tea beverages; flavorings for beverages; flavorings other than essential oils for beverages; extracts of cocoa for use as flavors in beverages; extracts of coffee for use as flavors in beverages; chocolate flavored beverage making preparations; plant flavorings other than essential oils for beverages; powder for making beverages; powdered sugar for preparing isotonic beverages; preparations of matted barley for use in making beverages; beverages consisting principally of coffee; beverages containing chocolate; beverages made from cereals; beverages made from chocolate; beverages made from tea, coffee, cocoa, drinking chocolate, and substitutes therefore; beverages made with chocolate; chocolate beverages containing milk; chocolate beverages with milk; chocolate essences for the preparation of beverages; chocolate extracts for the preparation of beverages; chocolate, coffee, tea, cocoa flavored beverages; chocolate food beverages not being dairy-based or vegetable based; chocolate syrups for the preparation of chocolate based beverages; cocoa beverages with milk; coffee-based beverage containing milk; coffee beverages with milk; herbal beverages, other than for medicinal use; herbal preparations for making beverages; ice beverages with a chocolate base; ice beverages with a cocoa base; ice beverages with a coffee base; ice coffee; ice beverages with a tea base; prepared cocoa and cocoa-based beverages; prepared coffee and coffee-based beverages; non-alcoholic beverages namely sweet iced tea and unsweetened iced tea; fruit sauces being condiments; fruit sauces in class 30.

Class 43: Restaurants; restaurant services; grill restaurants; delicatessens being restaurants; fast-food restaurants; restaurants and self-service restaurant services; self-service restaurants; snackbars; restaurant services for the provision of fast food; cafes; take away food services; cafe services; cafeterias; restaurant services for the provision of burgers; restaurant services for the provision of burgers and fries; restaurant services for the provision of burgers, fries and cola cafeteria services; cooking services; food cooking services; self-service cafeteria services; takeaway food and drink services; food and drink catering; catering services for restaurants; food preparation; preparation of food and drink; preparation of meals; preparation of take-away and fast food; carry-out restaurants; providing food and drink; provision of food and drink in restaurants; provision

of information relating to the preparation of food and drink; booking agency services for restaurants; provision of information relating to restaurants.