

O/411/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003468550

BY IMRAN ZAFAR

TO REGISTER THE TRADE MARK:

MUST EAT

IN CLASSES 29, 30 AND 43

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 420493 BY

JUST EAT HOLDING LIMITED

BACKGROUND AND PLEADINGS

1. On 20 February 2020, Imran Zafar (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 13 March 2020 and registration is sought for the following goods and services:

Class 29 Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats, ready-made dishes (not included in other classes).

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, ready-made dishes (not included in other classes).

Class 43 Providing of food and drink; cafés, cafeterias, catering, diner transportable, canteens, restaurants, snack-bars, pizzeria.

2. On 8 June 2020, Just Eat Holding Limited opposed the application on the basis of sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). Under both sections, the opponent relies upon the following trade marks:

JUST EAT

UKTM no. 3173466

Filing date 7 July 2016; registration date 24 November 2017

(“the First Earlier Mark”)

JUST EAT

EUTM no. 14370555¹

Filing date 16 July 2015; registration date 20 November 2015

("the Second Earlier Mark")

3. Under section 5(2)(b), the opponent relies upon some of the goods and services for which its marks are registered, as underlined in the Annex to this decision. The opposition based upon the First Earlier Mark is directed against all of the goods and services in the application. The opposition based upon the Second Earlier Mark is directed at only the class 43 services in the application. The opponent claims that there is a likelihood of confusion because the marks are similar, and the goods and services are identical or similar.

4. Under section 5(3), the opponent claims to have a reputation for all goods and services for which its marks are registered, as set out in the Annex to this decision. The opponent claims that use of the applicant's mark would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character and/or reputation of the earlier marks.

5. The applicant filed a counterstatement denying the claims made.

6. The applicant is represented by Shazia Anjum and the opponent is represented by Stobbs. Only the opponent filed evidence. Neither party requested a hearing and only the opponent filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

¹ Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 – please see Tribunal Practice Notice 2/2020 for further information.

EVIDENCE AND SUBMISSIONS

7. The opponent filed evidence in the form of the witness statement of Susan O'Brien dated 30 November 2020, which is accompanied by 21 exhibits. Ms O'Brien has been associated with the opponent for 4 years and is currently the Chief Marketing Officer.

8. Whilst I will not summarise the opponent's evidence or written submissions in lieu here, I have taken them into consideration and will refer to them below where necessary.

DECISION

Section 5(2)(b)

9. Section 5(2)(b) of the Act reads as follows:

“5(2) A trade mark shall not be registered if because –

(a)...

(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.”

10. Section 5A of the Act reads as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

11. By virtue of their earlier filing dates, the trade marks upon which the opponent relies qualify as earlier trade marks pursuant to section 6 of the Act. The opponent's marks had not completed their registration process more than 5 years before the filing date of the application in issue and are not, therefore, subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent can rely upon all of the goods and services it has identified.

12. Although the UK has left the EU, section 6(3)(a) of the European Union (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 Act relied upon in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

13. 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:

(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 goods and services

14. The competing goods and services are as follows:

Opponent's goods and services	Applicant's goods and services
<p data-bbox="193 306 794 342">First Earlier Mark</p> <p data-bbox="193 360 794 396"><u>Class 29</u></p> <p data-bbox="193 414 794 1328">Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; burgers, sausages and other processed meat products; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; prepared meals and semi-prepared meals consisting primarily of meat, fish, poultry or vegetables; soups; cooked and cured meat products; cheese, butter, pickles yoghurts; fruit salads; potato based snack foods; potato chips and fries; potato crisps; fruit based snack foods; fruit desserts; dairy desserts; milk based beverages including milk shakes; meat-based, nut-based or dairy-based snack foods.</p> <p data-bbox="193 1406 794 1442"><u>Class 30</u></p> <p data-bbox="193 1460 794 1993">Coffee, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, edible ices; honey, treacle; yeast, baking-powder; salt, mustard; seasonings; pepper; vinegar, sauces (condiments); spices; ice; sandwiches and filled bread rolls; rice based, pasta-based and flour-based prepared meals; pizzas, pies and pasta</p>	<p data-bbox="799 306 1398 342"><u>Class 29</u></p> <p data-bbox="799 360 1398 669">Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats, ready-made dishes (not included in other classes).</p> <p data-bbox="799 748 1398 784"><u>Class 30</u></p> <p data-bbox="799 801 1398 1223">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, ready-made dishes (not included in other classes).</p> <p data-bbox="799 1301 1398 1337"><u>Class 43</u></p> <p data-bbox="799 1355 1398 1552">Providing of food and drink; cafés, cafeterias, catering, diner transportable, canteens, restaurants, snack-bars, pizzeria.</p>

dishes; biscuits, cakes, cookies, pastries, pasties and other bakery products; ice cream; fillings and spreads for sandwiches; chocolate and chocolate confectionery; ice cream and ice lollies; frozen yoghurt; drinking chocolate; chocolate, caramel, toffee, butterscotch, fudge, fruit and other sweet sauces for ice cream; confectionery toppings for ice cream and other desserts; prepared meals and semi-prepared meals; prepared desserts; cereal-based snack foods; relishes.

Class 43

Services for providing food and drink; services for providing food and drink enabling customers to place orders for food and drink online; ordering of takeaway restaurant and restaurant meals arranged via a website; ordering and booking services for restaurants and takeaway restaurants; restaurant and take away restaurant services; provision of information relating to food and drink online; provision of information relating to restaurants and take away restaurants online; provision of information and advisory services relating to the aforesaid.

Second Earlier Mark

Class 43

Services for providing food and drink; services for providing food and drink enabling customers to place orders for food and drink online; operation of a website for the ordering of takeaway restaurant and restaurant meals; ordering and booking services for restaurants and takeaway restaurants; restaurant and take away restaurant services; provision of information relating to food and drink online; provision of information and advisory services relating to the aforesaid.	
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15. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, 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.”

16. 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.

17. 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 for 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.”

Class 29

18. “Meat, fish, poultry and game”, “meat extracts”, “preserved, dried and cooked fruits and vegetables”, “jellies, jams, [...]”, “eggs, milk and milk products” and “edible oils and fats” all appear identically in both the applicant’s specification and the specification of the First Earlier Mark.

19. “Compotes” in the specification of the First Earlier Mark falls within the broader category of “fruit sauces” in the applicant’s specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

20. “Ready-made dishes (not included in other classes)” in the applicant’s specification is identical on the principle outlined in *Meric* to “prepared meals and semi-prepared meals consisting primarily of meat, fish, poultry or vegetables” in class 29 of the specification of the First Earlier Mark. There will also be some similarity between this term and “take away restaurant services” in the First Earlier Mark’s specification. I recognise that the nature, method of use and purpose of the goods and services will differ. However, the goods and services may be in competition, as you may choose either to buy a pre-prepared meal or to purchase a meal from a takeaway service. The goods and services may also be complementary, as one is important or indispensable for the other, such that the average consumer may believe that they originate from the same undertaking.² I consider the goods and services to be similar to a medium degree.

Class 30

21. “Coffee, [...] cocoa, sugar, rice, tapioca, sago, artificial coffee”, “flour and preparations made from cereals, bread, pastry and confectionery, [...]”, “honey, treacle”, “yeast, baking-powder”, “salt, mustard”, “vinegar, sauces (condiments)” and “spices, ice, [...]” all appear identically in both the applicant’s specification and the specification of the First Earlier Mark.

22. “Tea” in the applicant’s specification will overlap in purpose, user and method of use with “coffee” in the specification of the First Earlier Mark. There will also be overlap in nature to the extent that both are products that can be added to hot water to form a consumable liquid. However, they differ in that one is commonly sold in granule form and the other is sold in the form of tea leaves (either loose or in bags). There may be some overlap in trade channels (such as specialist retailers that sell artisan tea/coffee) and I recognise that they are likely to be sold in close proximity in supermarkets. The goods are not complementary, but they will be in competition. Taking all of this into

² *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

account, I consider the goods to be similar to at least between a medium and high degree.

23. "Ices" in the applicant's specification is self-evidently identical or identical on the principle outlined in *Merix* to "ice" and "edible ices" in the specification of the First Earlier Mark.

24. "Ready-made dishes (not included in other classes)" in the applicant's specification is identical on the principle outlined in *Merix* to "prepared meals and semi-prepared meals" in class 30 of the specification of the First Earlier Mark. For the same reasons set out above, I also consider these goods to be similar to "take away restaurant services" in the specification of the First Earlier Mark to a medium degree.

Class 43

25. "Providing of food and drink" in the applicant's specification is self-evidently identical to "services for providing food and drink" and "take away restaurant services" in the specifications of the First and Second Earlier Marks.

26. "Cafés, cafeterias, catering, diner transportable, canteens, restaurants, snack-bars, pizzeria" in the applicant's specification all fall within the broader category of "services for providing food and drink" in the specifications of the First and Second Earlier Marks. These services can, therefore, be considered identical on the principle outlined in *Merix*. These services will also be either identical on the principle outlined in *Merix* or highly similar to "take away restaurant services" in the First and Second Earlier Marks' specifications. Where they are not identical, they will overlap in user, method of use, purpose, nature and trade channels. They will also be in competition. It is for these reasons that I consider they will be similar to at least a high degree.

A further consideration

27. Given the field in which the opponent operates, I also consider it necessary to make a finding in relation to the terms "operation of a website for the ordering of takeaway restaurant and restaurant meals" in the First Earlier Mark's specification,

“ordering of takeaway restaurant and restaurant meals arranged via a website” in the Second Earlier Mark’s specification and “ordering and booking services for restaurants and takeaway restaurants” in the specifications of both the First and Second Earlier Marks.

28. In my view, these are dissimilar to the applicant’s goods. This is because they differ in nature, method of use, purpose and trade channels. I recognise that there will be overlap in user, but this will not be enough on its own for a finding of similarity. I do not consider the goods and services to be either in competition or complementary. Taking all of this into account, I consider the goods and services to be dissimilar.

29. With regard to the applicant’s services, these will be provided by restaurants and takeaways directly. The opponent’s services will be provided through an intermediary. The services will, therefore, differ in trade channels. The method of use will be different, as the opponent’s services are likely to be selected through a website (or perhaps in some cases a telephone ordering system), whereas the applicant’s services are likely to be purchased in person (although I recognise that pre-orders may be placed in the case of takeaways for collection). The purpose will differ as the purpose of the applicant’s services is to provide food whereas the purpose of the opponent’s services is to put the user in contact with an appropriate restaurant, through which the customer will obtain food. The nature of the services is clearly different. I recognise that there may be overlap in user as both services may be purchased by members of the general public. There may also be a degree of competition, as the user may choose to purchase an order for a takeaway through the opponent’s services or attend a restaurant or takeaway themselves instead. I do not consider there to be any complementarity as, whilst the services might be important to each other, the average consumer would not consider the provider to be the same. This is because the opponent’s services are likely to be provided by an intermediary, rather than the restaurant themselves. Taking all of this into account, I consider the services to be similar to between a low and medium degree.

30. For the avoidance of doubt, except where outlined above, I consider the applicant’s goods to be dissimilar to the opponent’s “take away restaurant services” in the specification of the First Earlier Mark. There will be no overlap in trade channels,

method of use, purpose or nature. Whilst there may be some overlap in user, this is not enough on its own for a finding of similarity. The goods and services are neither in competition nor complementary.

The average consumer and the nature of the purchasing act

31. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

32. The average consumer for the goods and services will be a member of the general public. The goods are likely to be relatively low in price and will be purchased reasonably frequently, if not every day. Consequently, the average consumer is likely to pay a relatively low level of attention to the purchase of the goods, although I recognise that certain factors such as food intolerances and dietary requirements will be a consideration. I consider the level of attention paid during the purchasing process for the goods is likely to be between low and medium. The services are likely to vary in cost and frequency of purchase. However, the average consumer is likely to take various factors into consideration such as type of cuisine offered, customer service standards and/or speed of service. Consequently, the average consumer is likely to pay a medium degree of attention during the purchasing process for the services.

33. The goods are likely to be purchased by self-selection from the shelves of a retail outlet or their online equivalents. The services are likely to be purchased following perusal of signage on premises frontage or perusal of adverts and menus online. Taking all of this into account, I consider that the purchasing process for both the goods and services will be predominantly visual. However, given that advice may be sought from retail assistants and that word-of-mouth recommendations might be made, I do not discount an aural component.

Comparison of trade marks

34. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade 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.”

35. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

36. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
<p data-bbox="391 322 598 369" style="text-align: center;"><i>JUST EAT</i></p> <p data-bbox="360 468 628 504" style="text-align: center;">(First Earlier Mark)</p> <p data-bbox="416 577 572 611" style="text-align: center;">JUST EAT</p> <p data-bbox="336 687 652 723" style="text-align: center;">(Second Earlier Mark)</p>	<p data-bbox="879 315 1318 405" style="text-align: center;">MUST EAT</p>

Overall Impression

37. The First Earlier Mark consists of the words JUST EAT presented in a red italicized font. The words themselves play the greater role in the overall impression of the mark, with the colour and font playing a lesser role. The Second Earlier Mark consists of the words JUST EAT. There are no other elements to contribute to the overall impression of the mark which lies in the words themselves. The applicant's mark consists of the words MUST EAT presented in a red stylised font, with one of the vertical lines on each of the 'M', 'U' and 'A' having been elongated. The words themselves play the greater role in the overall impression, with the colour and stylisation playing a lesser role.

Visual Comparison

38. Visually, the First Earlier Mark and the applicant's mark overlap in the common second word 'EAT' and the same three letters of the first word -UST. They are also both presented in red, although in different fonts. The differing first letter M- in the applicant's mark and J- in the First Earlier Mark will be a point of visual difference. I bear in mind that the beginnings of marks tend to make more of an impact than the ends. Taking all of this into account, I consider the marks to be visually similar to between a medium and high degree.

39. I recognise that the Second Earlier Mark is not registered in red. However, as a word only mark, it could be used in any colour, including the same red colour as is used in the applicant's mark. Further, as a word only registration, it could also be used in any typeface. Taking all of this into account, as well as the factors discussed in the previous paragraph, I consider the marks to be visually similar to between a medium and high degree.

Aural Comparison

40. Aurally, the First and Second Earlier Marks will be pronounced identically, so the same comparison will apply to both.

41. The second syllable of all three marks – EAT- will be pronounced identically. There will also be overlap in the pronunciation of the first syllable – JUST and MUST. I bear in mind that the difference in pronunciation is at the beginning of the marks. Taking all of this into account, I consider the marks to be aurally similar to between a medium and high degree.

Conceptual Comparison

42. Conceptually, the same comparison will apply to both the First and Second Earlier Marks. There is a degree of ambiguity to the meaning conveyed by the First and Second Earlier Marks i.e. it may be viewed as a call to action or command (as in, just eat your food) or it may be used in the same way as 'only eat'. The applicant's mark is likely to be viewed as a command and does not have the same ambiguity as the earlier marks. Taking all of this into account, I consider the marks to be conceptually similar to at least a medium degree.

Distinctive character of the earlier trade marks

43. 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-2779, 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).”

44. Registered trade marks possess varying degrees of inherent distinctive character ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

45. I will begin by assessing the inherent distinctiveness of the earlier marks. The Second Earlier Mark consists of the words JUST EAT. As noted above, these words when used together, create a degree of ambiguity. However, when taking into account the goods and services relied upon, I consider them to be distinctive to between a low and medium degree. The same applies to the First Earlier Mark, although the use of colour and stylisation adds to the distinctiveness to a small degree.

46. I must now consider whether the distinctiveness of the earlier marks has been enhanced through use. Ms O'Brien states that the opponent has been using the mark JUST EAT throughout the UK since 2006 for the provision of an online food order and delivery service platform, acting as an intermediary between independent restaurants and takeaway outlets and the customers. Ms O'Brien states that the opponent is one of the leading online food and drink delivery platforms in the UK. The First Earlier Mark is displayed on screenshots of the opponent's website taken from the Wayback Machine from 1 December 2016 onwards (prior to which other versions of the words JUST EAT were displayed).³

47. Ms O'Brien provides the following figures for the opponent's website for the UK:

Year	Number of orders	Number of restaurants on the my Company's Platform
2015	67,048,094	30,795
2016	87,960,205	33,245
2017	104,891,636	34,565
2018	120,468,534	37,891
2019	131,819,694	43,422

Year	Number of Yearly Visitors
2015	7,184,929
2016	9,150,312
2017	10,513,131
2018	12,170,471
2019	13,136,918
1 January 2020-30 June 2020	11,023,272

48. Ms O'Brien explains that the opponent co-brands the exterior and interior of some of its restaurant partners. Ms O'Brien has provided some examples, which include stores located in Liverpool (installed October 2017), Leicester (installed December 2017), Carlisle (installed March 2018), London (installed March 2018), Bristol (installed May 2018), Wales (installed July 2018), Leeds (installed February 2019) and Glasgow (installed April 2019).⁴ Some of the example images are set out below:

³ Exhibit SO5

⁴ Exhibit SO8

Felix Chicken

Exterior and interior
Area: Peterborough
Installed 23/11/17



LA Pizza Time

Window Branding & A board
Area: Carlisle
Installed: 01/03/2018



Pizza Chalet

Exterior & Interior

Area: London

Installed: 14/12/18



49. Ms O'Brien explains that orders are placed through the opponent's app or website and when the food arrives, it will be delivered in "a JUST EAT paper bag", which is itself placed inside a JUST EAT thermal delivery bag. Ms O'Brien has provided the following undated examples:⁵



50. Ms O'Brien confirms that the opponent's app was launched in 2016 and has been downloaded in the United Kingdom over 22,000,000 times.

⁵ Exhibit SO9

51. Ms O'Brien explains that the opponent's revenue is generated through the restaurant partners' joining fees, co-branding opportunities (for which the restaurant contributes) and commission from each order placed through the app or website. Ms O'Brien confirms the sales for the UK were as follows:

2015-2016	£169.6million
2016-2017	£237.1million
2017-2018	£303.8million
2018-2019	£385.6million

52. By the end of June 2020, the opponent estimates that it had around a 54% market share for the services.

53. The opponent's promotional and marketing expenditure is as follows:

Year	Promotional figures
2017	£46,803,465
2018	£55,715,315
2019 (November 2019)	£59,943,215

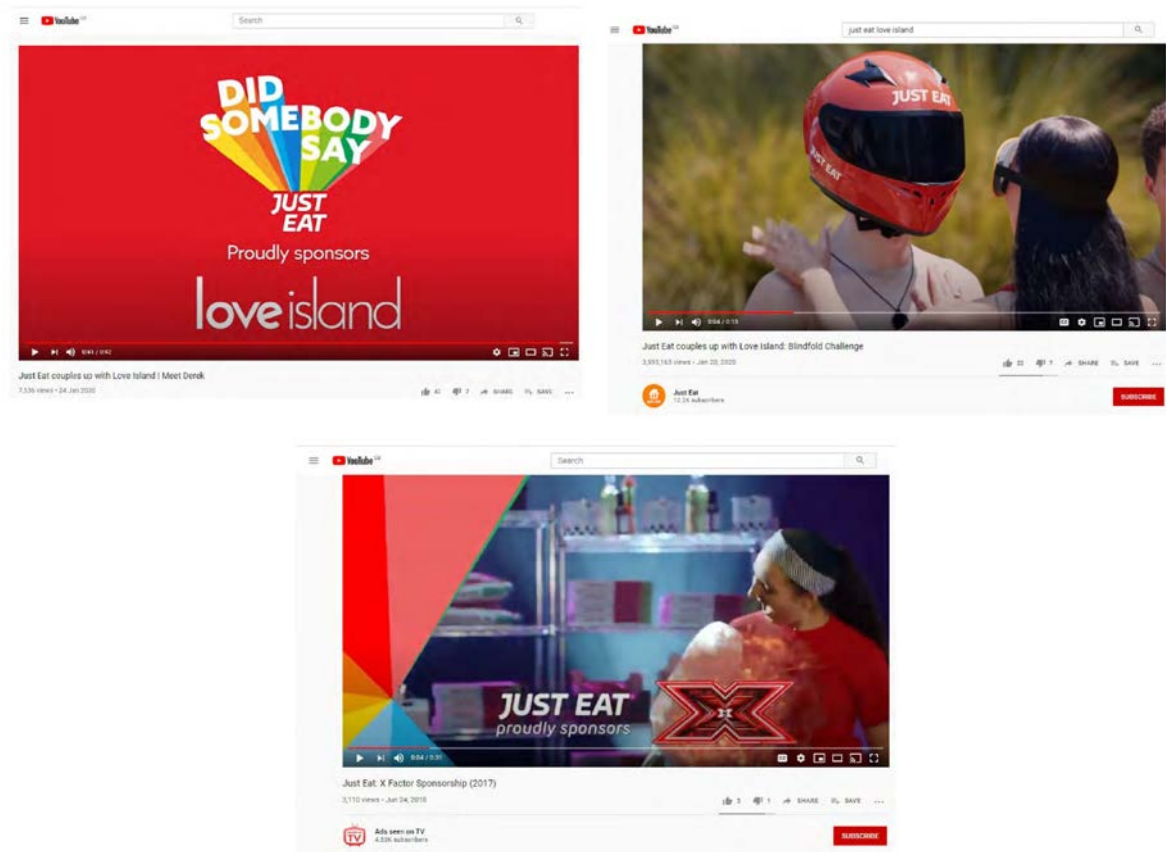
54. Ms O'Brien explains that the opponent has invested in a number of television marketing campaigns. She notes that through YouTube alone, the videos of these adverts have achieved 1.7million views (Madras, Baby in October 2015), 1.4million views (Balti Rocks in October 2015), 6.8million views (Just Eat: Delivering the Nation in November 2018) and over 18million views (Did Somebody Say Just Eat? In 2019).⁶ Ms O'Brien notes that the opponent also advertises on public transport, including the London Underground.⁷ Ms O'Brien notes that around 2million people use the London Underground every day; she calculates that based on a lifespan of 4 weeks for the opponent's adverts, this amounts to 56million people per month viewing the opponent's advertising.⁸

⁶ Exhibit SO14

⁷ Exhibit SO16

⁸ Exhibit SO15

55. Ms O'Brien also notes that the opponent has sponsored popular television shows including The X Factor in 2017 and Love Island in 2019. Ms O'Brien confirms that in 2017, 7million viewers watched the finale of The X Factor and Love Island accumulated 4million viewers. Ms O'Brien notes that the opponent's mark appears at the beginning and end of each episode and during each break:⁹



56. It is clear to me that the use of the marks has been geographically widespread throughout the UK. Notional and fair use of the Second Earlier Mark would include use in any typeface and colour. There is clearly use demonstrated above that would include use of both of the First and Second Earlier Marks. The marks have been used for a number of years in the UK and the opponent's sales figures under the marks are significant. The estimated market share for 2020 is high. Whilst I recognise that the position at the relevant date is likely to have been a lower market share, it is still likely to have been significant based upon the sales figures provided. It is not clear whether the advertising expenditure listed above relates to the UK only. However, taking into

⁹ Exhibit SO17

account the television advertising and other promotional activity described by Ms O'Brien it is likely that at least a significant proportion of that sum relates to the UK market. Taking all of this into account, there is clearly sufficient evidence to support the opponent's claim to enhanced distinctiveness in relation to providing an online platform for the ordering of food and drink for delivery. Given the opponent's evidence regarding co-branding, I also consider that the enhanced distinctiveness extends to "take away restaurant services". However, there is no evidence to support a finding in relation to the broader goods and services relied upon. I also consider it important to note that the opponent often uses its mark in red.

Likelihood of confusion

57. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. 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 and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact 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.

58. I have found the earlier marks and the applicant's mark to be visually and aurally similar to between a medium and high degree. I have found all of the marks to be conceptually similar to at least a medium degree. I have found the earlier marks to be inherently distinctive to between a low and medium degree, with the First Earlier Mark being inherently distinctive to a slightly higher degree than the Second Earlier Mark. I have found that the distinctiveness of the marks will have been enhanced through use

to a high degree in relation to providing an online platform for the ordering of food and drink for delivery and take away restaurant services. I have found the average consumer to be a member of the general public, who will purchase the goods and services by predominantly visual means (although I do not discount an aural component). I have concluded that a medium degree of attention will be paid during the purchasing process for the goods and services. I have found the goods and services to vary from being identical to similar to a medium degree, except for the opponent's "operation of a website for the ordering of takeaway restaurant and restaurant meals", "ordering of takeaway restaurant and restaurant meals arranged via a website" and "ordering and booking services for restaurants and takeaway restaurants" which I have found to be either dissimilar or similar to between a low and medium degree to the applicant's goods and services.

59. For the goods and services relied upon outside the scope of the opponent's enhanced distinctiveness, I have found that the earlier marks are distinctive to only between a low and medium degree. However, I recognise that this does not preclude a likelihood of confusion.¹⁰ I recognise that the differing letter in each mark appears at the beginning and that the beginnings of marks tend to make more of an impact than the end.¹¹ However, where the marks are used on identical or similar to at least between a medium and high degree goods and services, I consider that they are likely to be misremembered or mistakenly recalled as each other, notwithstanding the differing first letter and relatively low inherent distinctiveness. This will be even more likely for those goods and services that I have found to be identical or similar to those services for which the opponent has demonstrated enhanced distinctiveness, particularly given the fact that the opponent often uses its mark in red. Consequently, I consider there to be a likelihood of direct confusion.

60. The opposition based upon section 5(2)(b) succeeds in its entirety.

¹⁰ *L'Oréal SA v OHIM*, Case C-235/05 P

¹¹ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

Section 5(3)

61. Section 5(3) of the Act states:

“5(3) A trade mark which -

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

62. As noted above, by virtue of their earlier filing dates, the First and Second Earlier Marks qualify as earlier marks pursuant to section 6 of the Act. Given their registration dates, the earlier marks are not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods and services identified.

63. I bear in mind the relevant case law set out in the following judgments of the CJEU: *Case C-375/97, General Motors, Case 252/07, Intel, Case C-408/01, Adidas-Salomon, Case C-487/07, L’Oreal v Bellure* and *Case C-323/09, Marks and Spencer v Interflora*. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the earlier marks are similar to the applicant’s mark. Secondly, the opponent must show that the earlier marks have achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier marks being brought to mind by the later mark. Fourthly, assuming that the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods and services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

64. The relevant date for the purposes of the assessment under section 5(3) of the Act is the date of the application i.e. 20 February 2020.

Reputation

65. In *General Motors*, Case C-375/97, the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

66. The First Earlier Mark is a UKTM. Consequently, the opponent must establish a reputation in the UK. I have summarised the opponent's evidence in this regard above. Clearly, the use has been geographically widespread, intensive and long-standing. Further, the evidence supports a significant market share for providing an online platform for the ordering of food and drink for delivery. Further, there is a significant amount of advertising expenditure and this is supported by evidence of high profile television campaigns. There is evidence that the opponent has been included in co-branding take away outlets around the UK. Taking all of this into account, I am satisfied

that the opponent had a strong reputation for providing an online platform for the ordering of food and drink for delivery and take away restaurant services under the First Earlier Mark in the UK at the relevant date.

67. The Second Earlier Mark is an EUTM. Consequently, the opponent must establish a reputation in the EU. I have already found a reputation in the UK which, at the relevant date, was a member state of the EU. Consequently, I consider the evidence set out above to also be sufficient to establish a reputation within the EU. However, in addition to this I note that Ms O'Brien has also provided evidence regarding visitors to the opponent's Irish and Spanish websites between 2015 and 2019.¹² Although these do not appear to be broken down by country, they do run from tens of thousands to millions of visitors per day. Clearly there is, therefore, also use in other European markets. Taking all of this into account, I am satisfied that the opponent had a strong reputation for providing an online platform for the ordering of food and drink for delivery and take away restaurant services under the Second Earlier Mark in the EU at the relevant date.

Link

68. As I noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

The degree of similarity between the conflicting marks

I have found the earlier marks and the applicant's mark to be visually and aurally similar to a between a medium and high degree. I have found all of the marks to be conceptually similar to at least a medium degree.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or

¹² Exhibit SO10

dissimilarity between those goods or services, and the relevant section of the public

I have found the services for which the opponent has demonstrated a reputation to vary from being dissimilar to the applicant's goods to identical to the applicant's services.

The strength of the earlier mark's reputation

The earlier marks have a strong reputation in the UK and EU for providing an online platform for the ordering of food and drink for delivery and take away restaurant services. I note that the earlier marks are often used in the colour red.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

I have found the Second Earlier Mark to be inherently distinctive to between a low and medium degree, with the First Earlier Mark being slightly higher in distinctiveness. The distinctiveness of both earlier marks will have been enhanced through use in relation to providing an online platform for the ordering of food and drink for delivery and take away restaurant services to a high degree.

Whether there is a likelihood of confusion

I have found there to be a likelihood of confusion in relation to those goods and services that are similar. Where there is dissimilarity of goods and services, there can be no likelihood of confusion.

69. Taking into account the above factors, I consider that the similarity between the marks, combined with the strength of the opponent's reputation will be sufficient for a link to be made by a significant part of the relevant public, even in relation to those goods that are dissimilar.

Damage

70. I must now assess whether any of the three pleaded types of damage will arise.

71. To the extent that the relevant public will believe that the applicant's goods and services originate from the same or economically connected undertakings, damage will clearly arise. However, this will only apply to those goods and services that I have found to share at least some similarity with the services for which the opponent has demonstrated a reputation. I will now consider the opponent's other pleadings regarding damage.

Unfair Advantage

72. Question 3 of the Form TM7 states:

"Is it claimed that the similarity between the reputed earlier trade mark and the later trade mark is such that the relevant public will believe that they are used by the same undertaking or think that there is an economic connection between the users of the trade marks?"

The opponent has ticked the "yes" box in answer to this question.

73. Question 4 of the Form TM7 states:

"Is there any other basis for your claim of unfair advantage? If so, please explain what the advantage would be to the holder of the later mark, and why it is unfair."

74. In answer to this question, the opponent has referred to paragraphs 26 and 27 of the Statement of Grounds. These paragraphs state:

"26. The Opponent has invested significantly in its business and its brand over a long period of time in order to establish its substantial reputation. The

Applicant will benefit from the attractiveness of the Opponent's Earlier Trade Marks by affixing on goods and services a sign which is highly similar to the Opponent's Earlier Trade Marks. This means that consumers in the UK may mistakenly presume goods and services under the Contested Sign are associated, and thus of the same quality of those under the Opponent's Earlier Trade Marks. In this regard, the Applicant obtains an unfair benefit by virtue of the association of the Contested Application with the attractiveness enjoyed by the Opponent's Earlier Trade Marks.

27. Use of the Contested Sign, without due cause, means that the Applicant is capitalising on the Opponent's investment for its own commercial gain. The Applicant will not have to make the same investment in brand awareness or in its advertising as the relevant public are likely to perceive the Applicant's goods and services as the Opponent's." (my emphasis)

75. Both of these paragraphs, when read in their entirety, refer to the relevant public believing that the parties are linked or the same. There does not, therefore, appear to me to be any unfair advantage pleading over and above the circumstances described in question 3 of the Form TM7, as quoted above. There does not appear to be any separately pleaded image transfer claim. Consequently, this head of damage is not made out in relation to those goods in the applicant's specification that I have found to be dissimilar to the services for which the opponent has a reputation.

Detriment to reputation

76. Question 5 of the Form TM7 states:

"Is there any other basis for your claim to detriment to the reputation of the earlier mark? If so, please explain what the detriment would be and how it would occur."

77. In response to this question, the opponent has referred to paragraphs 27 and 28 of the Statement of Grounds. Paragraph 27 is set out above. Paragraph 28 states:

28. Furthermore, in view of the nature of the goods and services at issue, if the quality of the goods and services provided by the Applicant are poor, this could be detrimental to the repute of the Opponent's Earlier Trade Marks. As a result, the Opponent submits that the Contested Application falls foul of Section 5(3) of the Trade Marks Act 1994."

78. Paragraph 27 appears, again, to be a reference to the relevant public believing the parties are the same or associated undertakings. With regard to paragraph 28, I am mindful of the decision of Ms Anna Carboni, sitting as the Appointed Person in *United The Union v The Unite Group Plc*, Case BL O/219/13, in which she considered whether a link between an earlier mark with a reputation and a later mark with the mere potential to create a negative association because of the identity of the applicant or the potential quality of its goods/services was sufficient to found an opposition based on detriment to reputation. She stated:

"46. Indeed, having reviewed these and other opposition cases, I have not found any in which the identity or activities of the trade mark applicant have been considered in coming to a conclusion on the existence of detriment to repute of an earlier trade mark. I can understand how these matters would form part of the relevant context in an infringement case, but I have difficulty with the notion that it should do so in an opposition. After all, many, if not most, trade mark applications are for trade marks which have not yet been used by the proprietor; some are applied for by a person or entity that intends to license them to a third party rather than use them him/itself; and others are applied for by an entity that has only just come into existence.

47. I do not exclude the possibility that, where an established trading entity applies to register a mark that it has already been using for the goods or services to be covered by the mark, in such a way that the mark and thus the trader have already acquired some associated negative reputation, perhaps for poor quality goods or services, this fact might be taken into account as relevant "context" in assessing the risk of detriment to repute of an earlier trade mark. Another scenario might be if, for example, a trade mark applicant who was a known Fascist had advertised the fact prior to the application that he was

launching a new line of Nazi memorabilia under his name: I can see how that might be relevant context on which the opponent could rely if the goods and services covered by the application appeared to match the advertised activities. But I would hesitate to decide an opposition on that basis without having had confirmation from a higher tribunal that it would be correct to take such matters into account.”

79. I have no evidence before me that the applicant has been trading prior to the relevant date. I do not, therefore, consider that a hypothetical pleading about the potential quality of the goods or services that might be offered by the applicant in the future are sufficient to establish damage under this heading. Damage is not made out.

Detriment to distinctive character

80. Question 6 of the Form TM7 states:

“Is there any other basis for your claim of detriment to the distinctive character of the earlier mark? If so, please explain what the detriment would be and how it would affect the economic behaviour of the relevant public.”

81. In answer to this question, the opponent has referred to paragraphs 23 to 28 of the Statement of Grounds. I have set out paragraphs 26 to 28 above. There does not appear to be anything in these paragraphs which would form the basis of damage arising through detriment to distinctive character. Paragraphs 23 to 25 state:

“23. Use of the Contested Sign by the Applicant without due cause, would be detrimental to, and take unfair advantage of the distinctive character and repute of the Earlier Trade Marks.

24. The Opponent has developed a substantial reputation in its Earlier Trade Marks in the UK, in relation to its core offering, an online platform for the ordering and delivery of food and drink. This reputation was established prior to the filing date of the Contested Application.

25. Due to the high degree of similarity between the trade marks, the identity between the goods and services, the distinctiveness of the Opponent's Earlier Trade Marks, the existence of a likelihood of confusion on the part of the public, and in particular the nature of the Opponent's reputation, use of the Contested Sign, will, for the relevant public, bring to mind the Opponent's Earlier Trade Marks."

82. Paragraph 23 appears to be a general statement that damage will arise but does not give any particulars about how it is expected to arise. Paragraph 24 appears to be a pleading regarding the nature and strength of the opponent's reputation. Paragraph 25 appears to be a pleading relating to a link arising as already discussed above. None of these paragraphs appear to set out any claim as to why detriment to distinctive character would arise. Consequently, damage is not made out.

83. The opposition based upon section 5(3) succeeds in relation to the following goods and services only:

Class 29 Ready-made dishes (not included in other classes).

Class 30 Ready-made dishes (not included in other classes).

Class 43 Providing of food and drink; cafés, cafeterias, catering, diner transportable, canteens, restaurants, snack-bars, pizzeria.

CONCLUSION

84. The opposition is successful, and the application is refused.

COSTS

85. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the opponent the sum of **£1400**, calculated as follows:

Preparing a statement and considering the applicant's statement	£400
Filing evidence and considering the applicant's evidence	£800
Official fee	£200
Total	£1400

86. I therefore order Imran Zafar to pay Just Eat Holding Limited the sum of £1400. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 2nd day of June 2021

S WILSON

For the Registrar

ANNEX

First Earlier Mark

Class 9

Computer software; computer software applications; software applications for mobile and hand-held electronic devices; software applications for smart televisions; order tracking software; order management software; business management software; inventory management software; financial management software; customer relationship management software; electronic payment machines; Electronic Point of Sale (EPOS) systems; Electronic Point of Sale (EPOS) systems comprising computer hardware and software, telecommunications apparatus and instruments; downloadable computer software to allow users to perform electronic business transactions via a global computer network; downloadable computer software to allow users to receive and process orders via a global computer network; downloadable computer software applications to allow users to search, order, browse menus, rate, comment and track the delivery of, restaurant and take-away restaurants meals online; computer software applications relating to the sale, order and delivery of customer orders; computer software applications relating to the sale, order and delivery of restaurant and take-away restaurant meals; computer software for use in navigation for and location identification of a delivery vehicle; encoded gift cards; encoded loyalty cards; memory cards or chip cards intended to be purchased to be delivered as gifts to others and to allow them to make purchases in the credit limit or under the conditions stored in the cards; electronic publications relating to food and drink, including restaurants and takeaway restaurants; electronic publications relating to the sale, order and delivery of goods including restaurant and takeaway restaurant meals; electronic publications relating to Electronic Point of Sale (EPOS) systems, order management, order tracking and order delivery systems and software.

Class 16

Paper, cardboard; paper rolls for electronic payment machines; packaging containers and packaging material made of paper or made of paper coated with plastic material; food containers made of paper or cardboard; bags, sacks and sheets for packaging and storage of foodstuffs and liquid or semi-liquid products; paper or cardboard containers for ice cream; cone sleeves; plastic materials for packaging (not included

in other classes); plastic films for wrapping; plastic film for wrapping; plastic bags; printed matter; printed publications and magazines; stationery; sign boards of paper or cardboard; window stickers; decalcomanias; wrapping paper.

Class 20

Plastic containers for foodstuffs, namely restaurant and take-away restaurant meals; bottle caps and bottle closures (not of metal); transport pallets (not of metal); containers of plastic; bottle caps.

Class 21

Household and kitchen utensils and containers; foil containers for food; bottles; heat-insulated containers for foodstuffs; mugs, cups, porcelain and earthenware; disposable cups; paper plates; biodegradable paper pulp-based plates, bowls and cups; drinking straws; isothermic bags; isothermic bags for delivering meals from restaurants or take away restaurants; isothermic bags for pizzas.

Class 25

Clothing; footwear; headgear; aprons; hats and caps.

Class 29

Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; burgers, sausages and other processed meat products; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; prepared meals and semi-prepared meals consisting primarily of meat, fish, poultry or vegetables; soups; cooked and cured meat products; cheese, butter, pickles yoghurts; fruit salads; potato based snack foods; potato chips and fries; potato crisps; fruit based snack foods; fruit desserts; dairy desserts; milk based beverages including milk shakes; meat-based, nut-based or dairy-based snack foods.

Class 30

Coffee, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, edible ices; honey, treacle; yeast, baking-powder; salt, mustard; seasonings; pepper; vinegar, sauces (condiments); spices; ice; sandwiches and filled bread rolls; rice based, pasta-based and flour-based

prepared meals; pizzas, pies and pasta dishes; biscuits, cakes, cookies, pastries, pasties and other bakery products; ice cream; fillings and spreads for sandwiches; chocolate and chocolate confectionery; ice cream and ice lollies; frozen yoghurt; drinking chocolate; chocolate, caramel, toffee, butterscotch, fudge, fruit and other sweet sauces for ice cream; confectionery toppings for ice cream and other desserts; prepared meals and semi-prepared meals; prepared desserts; cereal-based snack foods; relishes.

Class 32

Beers; mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; syrups for making beverages; shandy, de-alcoholised drinks, non-alcoholic beers and non-alcoholic wines.

Class 35

Advertising; business management; business administration; office functions; business analysis, research and information services; business data analysis services; analysis of market research data and statistics; business consultancy services; provision of business and commercial information in the field of food and drink, including restaurants and take-away restaurants; listing restaurant and take away restaurant particulars and menus on the Internet (business and commercial information); directory and search services (business and commercial information); restaurant and take away restaurant directory and search services (business and commercial information); opinion polling; restaurant and take away restaurant opinion polling; industry statistics; restaurant and take away restaurant industry statistics; Internet advertising services; Internet advertising services for restaurants and take away restaurants; distribution of advertising material; consumer generated reviews for the purpose of consumer research; consumer generated reviews of restaurants and take away restaurants for the purposes of consumer research; providing consumer information, namely ratings and reviews of restaurants and take away restaurants, and compilations of ratings and reviews for restaurants and take away restaurants; procurement services; order procurement services; order procurement services for restaurants and take away restaurants; computerized online ordering services; ordering services for third parties; market research services; market research services for restaurants and takeaway restaurants; promotional services; promotional services

for restaurants and take away restaurants; the bringing together, for the benefit of others, of a variety of take-away restaurant and restaurant services, enabling customers to conveniently view and purchase those services online via an internet website or via a computer software application; marketing and promoting the goods and services of others by distributing coupons; marketing and promoting the goods and services of others by distributing coupons for restaurant and take-away restaurant meals; organisation, operation and supervision of consumer loyalty and incentive schemes; administration of programs to enable customers to obtain discounts on services provided by restaurants and take-away restaurants; customer services, namely responding to customer inquiries on behalf of others; organization of competitions and awarding of prizes for commercial or advertising purposes; sales promotion (for others); awarding of prizes for marketing purposes; hiring, rental and leasing of electronic point of sale (EPOS) systems; information and advisory services relating to the aforesaid.

Class 38

Telecommunications; provision of access to the internet; transmission of consumer generated reviews online; transmission of consumer generated reviews for restaurants and take away restaurants online; provision of on-line forums, chat rooms, bulletin boards and web journals (blogs); messaging services; provision of internet portals; provision of internet portals online to facilitate electronic business transactions via a global computer network; providing online and telecommunication facilities for real-time interaction between and among users of computers, mobile and handheld computers, and wired and wireless communication devices; hiring, rental and leasing of telecommunications apparatus and instruments; operation of an online portal for the delivery of takeaway restaurant and restaurant meals, and for other goods; operation of an online portal for the ordering of takeaway restaurant and restaurant meals; information and advisory services relating to the aforesaid.

Class 39

Transport; packaging and storage of goods; travel arrangement; delivery services; food delivery services; arranging the delivery of takeaway restaurant and restaurant meals, and for other goods, via a website; information and advisory services relating to the aforesaid.

Class 41

Providing electronic publications (not-downloadable); publication of books, journals, periodicals, newspapers and magazines, including electronic versions thereof online; publication of web journals (blogs); publication of restaurant and takeaway restaurant guides, including electronic version thereof online; arranging and conducting of conferences, forums, colloquiums, seminars or professional exhibitions in the field of restaurants and takeaway restaurants; arranging and conducting awards ceremonies; organisations of competitions in the field of food and drink including restaurants and takeaway restaurants; organising judging panels in relation to food and drink competitions; education and training in the field of food and drink and in the field of Electronic Point of Sale (EPOS) systems, order management, order tracking and order delivery systems and software.

Class 42

Design and development of computer software; Application service provider (ASP) and software as a service (SaaS) services relating to order management, order tracking and order delivery systems and/or relating to Electronic Point of Sale systems; Application service provider (ASP) and software as a service (SaaS) services to allow users to perform electronic business transactions via a global computer network; provision of an Internet platform for ecommerce; provision of software tools and software platforms online to facilitate electronic business transactions via a global computer network and/or to allow users to receive, process, and manage orders online; providing temporary use online of non-downloadable software to facilitate the processing, tracking and delivery of customer orders; providing temporary use online of non-downloadable software to facilitate communication between customer, seller and delivery vehicle; providing temporary use online of non-downloadable software for use in navigation and location identification of a delivery vehicle; computer programming services; consultancy services related to electronic point of sale (EPOS) systems and computer hardware and software, including telephonic and on-line support; consultancy services related to the setting up and operation of websites and internet portals; creating, maintaining and hosting websites and internet portals; hosting of digital content, namely online journals and blogs; installation, maintenance and repair of computer software; web site security services for the protection of

personal and financial data; advisory services relating to computer security; technical data analysis services; information and advisory services relating to the aforesaid.

Class 43

Services for providing food and drink; services for providing food and drink enabling customers to place orders for food and drink online; ordering of takeaway restaurant and restaurant meals arranged via a website; ordering and booking services for restaurants and takeaway restaurants; restaurant and take away restaurant services; provision of information relating to food and drink online; provision of information relating to restaurants and take away restaurants online; provision of information and advisory services relating to the aforesaid.

Second Earlier Mark

Class 9

Computer software; computer software applications; software applications for mobile and hand-held electronic devices; the aforesaid all relating to the field of food and drink and/or the sale, order and delivery of goods including restaurants and takeaway restaurant meals; order tracking software; Electronic Point of Sale (EPOS) systems; Electronic Point of Sale (EPOS) systems comprising computer hardware and software, telecommunications apparatus and instruments; downloadable computer software to allow users to perform electronic business transactions via a global computer network; downloadable computer software to allow users to receive and process orders via a global computer network; downloadable computer software applications to allow users to search, order, browse menus, rate, comment and track the delivery of, restaurant and take-away restaurants meals online; computer software applications relating to the sale, order and delivery of customer orders; computer software applications relating to the sale, order and delivery of restaurant and take-away restaurant meals; computer software for use in navigation for and location identification of a delivery vehicle; electronic publications relating to food and drink; electronic publications relating to the sale, order and delivery of goods including restaurant and takeaway restaurant meals; electronic publications relating to Electronic Point of Sale (EPOS) systems, order management, order tracking and order delivery systems; none of the aforesaid relating to dating and/or online social networking services.

Class 35

Advertising; business management; business administration; office functions; listing restaurant and take away restaurant particulars and menus on the Internet (business and commercial information); directory and search services (business and commercial information); restaurant and take away restaurant directory and search services (business and commercial information); opinion polling; restaurant and take away restaurant opinion polling; industry statistics; restaurant and take away restaurant industry statistics; Internet advertising services; Internet advertising services for restaurants and take away restaurants; consumer generated reviews for the purpose of consumer research; consumer generated reviews of restaurants and take away restaurants for the purposes of consumer research; procurement services; order procurement services; order procurement services for restaurants and take away restaurants; market research services; market research services for restaurants and takeaway restaurants; information and advisory services relating to the aforesaid; The bringing together, for the benefit of others, of a variety of take-away restaurant and restaurant services, enabling customers to conveniently view and purchase those services online via an internet website or via a computer software application.

Class 38

Telecommunications; provision of access to the internet; transmission of consumer generated reviews online; transmission of consumer generated reviews for restaurants and take away restaurants online; provision of on-line forums, chat rooms, bulletin boards and web journals (blogs); messaging services; provision of internet portals; provision of internet portals online to facilitate electronic business transactions via a global computer network; hiring, rental and leasing of telecommunications apparatus and instruments; operation of an online portal for the delivery of takeaway restaurant and restaurant meals, and for other goods; operation of an online portal for the ordering of takeaway restaurant and restaurant meals; information and advisory services relating to the aforesaid; the aforesaid services relating to the fields of food and drink and/or the sale, order and delivery of goods including restaurants and takeaway restaurant meals, and/or EPOS (Electronic Point of Sale) systems, order management, order tracking and order delivery systems, or related software and support; none of the aforesaid relating to dating and/or online social networking services.

Class 39

Transport; packaging and storage of goods; travel arrangement; delivery services; food delivery services; operation of a website for the delivery of takeaway restaurant and restaurant meals, and for other goods; information and advisory services relating to the aforesaid.

Class 42

Design and development of computer software relating to order management, order tracking and order delivery systems and/or relating to Electronic Point of Sale systems; Application service provider (ASP) and software as a service (SaaS) services relating to order management, order tracking and order delivery systems and/or relating to Electronic Point of Sale systems; Application service provider (ASP) and software as a service (SaaS) services to allow users to perform electronic business transactions via a global computer network; provision of software tools and software platforms online to facilitate electronic business transactions via a global computer network and/or to allow users to receive and process orders online; providing temporary use online of non-downloadable software to facilitate the processing, tracking and delivery of customer orders; providing temporary use online of non-downloadable software to facilitate communication between customer, seller and delivery vehicle; providing temporary use online of non-downloadable software for use in navigation and location identification of a delivery vehicle; computer programming services relating to order management, order tracking and order delivery systems and/or relating to Electronic Point of Sale (EPOS) systems; consultancy services related to electronic point of sale (EPOS) systems and computer hardware and software, including telephonic and on-line support; consultancy services related to the setting up and operation of websites and internet portals in the field of restaurants and take away restaurants, order management, order tracking and order delivery systems and/or Electronic Point of Sale systems; creating, maintaining and hosting websites and internet portals in the field of restaurants and take away restaurants, order management, order tracking and order delivery systems and/or Electronic Point of Sale systems; installation, maintenance and repair of computer software in the field of order management, order tracking and order delivery systems and/or Electronic Point of Sale systems; web site security services for the protection of personal and financial data; advisory services

relating to computer security; hiring, rental and leasing of electronic point of sale (EPOS) systems; information and advisory services relating to the aforesaid; none of the aforesaid relating to dating and/or online social networking services.

Class 43

Services for providing food and drink; services for providing food and drink enabling customers to place orders for food and drink online; operation of a website for the ordering of takeaway restaurant and restaurant meals; ordering and booking services for restaurants and takeaway restaurants; restaurant and take away restaurant services; provision of information relating to food and drink online; provision of information and advisory services relating to the aforesaid.