

**BL O/950/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION 3603770**

**BY**

**HAIN FROZEN FOODS UK LIMITED**

**TO REGISTER THE FOLLOWING TRADE MARK:**

**MEATLESS KITCHEN**

**AND**

**OPPOSITION NO. 425859 THERETO**

**BY**

**THE MEATLESS FARM LIMITED**

## **Background and pleadings**

1. On 3 March 2021, Hain Frozen Foods UK Limited (the “Applicant”) applied to register the word only trade mark MEATLESS KITCHEN. The contested application was accepted, and published for opposition purposes in the Trade Marks Journal on 30 April 2021. Registration of the mark is sought in respect of the following goods:

Class 29     *Meat substitutes; poultry substitutes; seafood substitutes; soy based meat substitutes; soy based poultry substitutes; soy based seafood substitutes; meat substitutes made from texturized vegetable protein; poultry substitutes made from texturized vegetable protein; seafood substitutes made from texturized vegetable protein; vegetable based meat substitutes; vegetable based poultry substitutes; vegetable based seafood substitutes; refrigerated and frozen prepared entrees consisting primarily of vegetables; refrigerated and frozen prepared entrees consisting primarily of meat substitutes; refrigerated and frozen prepared entrees consisting primarily of poultry substitutes; refrigerated and frozen prepared entrees consisting primarily of seafood substitutes.*

2. On 29 July 2021, The Meatless Farm Limited (the “Opponent”) opposed the application under Section 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The Section 5(3) and 5(4)(a) objections were later withdrawn following receipt of the Applicant’s counterstatement. For the purposes of the Section 5(2)(b) objection, the Opponent relied upon one earlier United Kingdom Trade Mark (UKTM):

UKTM No. 3330812

MEATLESS FARM

Filing date: 10 August 2018

Registration date: 16 November 2018

3. For the purposes of this opposition, the Opponent relied upon all of the goods for which the earlier mark is registered, namely:

Class 29 *Plant protein; plant protein derived from soya, rice and peas; soya [prepared]; meat substitutes derived from plant protein; meat substitutes; formed textured vegetable protein for use as a meat substitute; vegan burgers; vegan sausages; vegan minced meat substitute; vegan meatballs; prepared ready cooked meals consisting principally of meat substitutes; milk products; milk substitutes.*

4. Since the filing date of the earlier mark predates that of the contested application, the Opponent's mark is considered to be an "earlier mark" in accordance with section 6 of the Act.<sup>1</sup> However, as the mark has not been registered for a period of five years or more before the filing date of the application, it is not subject to the use requirements specified within section 6A of the Act. As a consequence, the Opponent may rely upon any or all of the goods for which the earlier mark is registered without having to show that it has used the mark at all.

5. The opposition is aimed against all of the goods in the contested application. The Opponent claimed that the contested goods may be sold through the same trade channels, that they have the same customer base, and that they are in direct competition with those of the earlier mark.

6. The Opponent submitted that each mark contains the identical term MEATLESS. The Opponent expressed its opposition in the following terms:

"Given the high similarity of the marks and the similarity of the goods, the Applicant's use of the mark applied for will result in a likelihood of confusion on the part of the public, including a likelihood of association. Customers of the Opponent and members of the public will be confused into believing that goods provided by the Applicant bearing such a similar mark originate from the Opponent, or that the Applicant is somehow linked to the Opponent."

7. On 8 August 2022, the Applicant filed a counterstatement denying that there exists a likelihood of confusion between the marks. The Applicant also denied that the

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<sup>1</sup> 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. Tribunal Practice Notice 2/2020 refers.

relevant consumer would believe the parties are somehow linked. The Applicant submitted that the word MEATLESS in each mark is descriptive and non-distinctive for the goods at issue, and therefore carries little weight in the global comparison of the mark. The Applicant argued that the marks differ as to their second element, which will be the focus of the consumer's attention. The Applicant acknowledged that the goods at issue are identical or similar, but argued that this alone is insufficient for finding a likelihood of confusion.

8. On 9 May 2022, the Applicant filed evidence and submissions in support of its application. The Applicant submitted that the goods at issue are neither specialised nor highly priced, and are intended for daily consumption. The Applicant submitted that the goods are directed at the public at large, who will only pay an average degree of attention.

9. The Applicant submitted that MEATLESS is a synonym for "meat-free", which is used commonly in the context of meat-substitute food products. The Applicant argued that the word FARM in the earlier mark is not particularly distinctive in the context of its goods, due to it being a common English word which is associated with the production of food. According to the Applicant, the earlier mark is consequently a mark which possesses low distinctive character.

10. The Applicant accepted that consumers read from left to right, and that the word MEATLESS is the first word the consumer will be faced with when seeing or hearing the marks at issue. However, the Applicant submitted that it is not appropriate to dissect the marks into their individual elements, as consumers tend to perceive a mark as a whole. That having been said, the Applicant argued that the word MEATLESS will not be treated by the consumer as having trade mark significance, nor will they perceive it as having an independent distinctive role within the mark. The Applicant argued that the second element will play a greater role in the consumer's perception of the marks as a whole, and these elements in each mark are visually and aurally different. The Applicant submitted that the perception of the earlier mark is one of a farm that produces goods that do not contain meat, whilst the perception of the contested mark is one of a kitchen which makes meat-free meals. Although both a FARM and KITCHEN have a connection with food, the link between these two words

is too remote to say that they are conceptually similar. The Applicant contended that the marks are therefore also conceptually different.

11. The Applicant referred to the judgment *European Ltd v Economist Newspapers Ltd* [1998] FSR 283:

*“But in my judgment any contention on behalf of the plaintiff that the word ‘European’ forms an essential feature of its registered trade mark which distinguishes the origin of its newspaper would almost inevitably lead to the very monopoly which it disclaims, and the judge was rightly reluctant to accept this. Where descriptive words are included in a registered trade mark, the courts have always and rightly been exceedingly wary of granting a monopoly in their use.”*

The Applicant submitted that in view of the above, the relevant public will attribute more weight to the second element of each mark, i.e., FARM and KITCHEN

12. Accompanying the Applicant’s submissions was the witness statement of Gavin Lloyd Llewellyn, the inclusion of which was designed primarily to support the Applicant’s position that MEATLESS is a descriptive synonym for meat-free. The witness statement referred to several exhibits in this regard. I do not consider it necessary to summarise the exhibits here, as both parties have agreed (in one form or another) that MEATLESS means without meat, and so it is not a point of contention that requires proving.

13. The Opponent elected not to file evidence of fact in reply. However, it did elect to file submissions in lieu of a Hearing on 1 September 2022. The submissions largely reiterated the Opponent’s previous position, and added that although the goods at issue are not highly priced, they are nevertheless specialised goods, as they form part of a vegetarian or vegan diet, with the relevant consumers carefully selecting their food to ensure they do not consume meat.

14. The Opponent accepted the Applicant’s submission that ordinarily the word MEATLESS has no distinctive character. However, the Opponent argued that it has made extensive use of the mark in order to build reputation and distinctiveness within the market (see paragraph 9 of said submissions). The information provided in this

regard was included for the first time in the Opponent's submissions in lieu, and therefore cannot be considered and is inadmissible, as it was submitted outside of the relevant period allocated for submissions of evidence.<sup>2</sup> The Opponent referred to the Applicant's exhibit GLL7, entitled '*Meatless meat: which brand is winning share of mind in the UK?*', and highlighted the quote: "Meatless Farm, Vivera and Heck all enjoy more share of mind here in the UK". The Opponent submitted that the referred to market share and awareness "...it is as a result of the significant marketing that [the Opponent] has undertaken to create a distinctive brand".

15. The Opponent submitted that in common culture, farming has traditionally been orientated around the production of meat and animal products. Therefore, "...the overall impression created by MEATLESS FARM would appear to the average consumer to be against societal norms and therefore have a distinctive overall impression." The Opponent went on to submit that "However, due to the rise of vegan and vegetarian restaurants it is far more common for a kitchen to be 'meatless' and therefore is far more likely to be a descriptive term as a whole". The Opponent argued that it is common knowledge that kitchens obtain produce from various entities, including farms. Therefore, the use of FARM in the earlier mark and KITCHEN in the contested mark could infer a supply-chain connection.

16. Both parties are professionally represented. The Applicant is represented by Stone King LLP and the Opponent is represented by Walker Morris LLP.

## **Decision**

17. 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. That is why this decision continues to refer to EU trade mark law.

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<sup>2</sup> See the IPO's correspondence of 4 August 2022:

### ***"What happens next***

*The case is now ready for a substantive decision. Before this is reached, the parties have an opportunity to make any final submissions about the merits of their case. These can be provided in writing, or at a hearing (if requested). **This is not an opportunity to give further evidence.***

## Section 5(2)(b)

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

“(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”.

19. 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 great degree of similarity between the marks, and vice versa;

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

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

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

(k) if the association between the marks creates a risk that the public might 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**

20. Both parties provided submissions in relation to the respective goods at issue. Whilst the parties' comments are noted, the degree of similarity or identity of the specifications, as the case may be, is something which fundamentally contributes to whether there is a likelihood of confusion. I must therefore conduct my own full analysis



of the goods at issue. I shall refer to the submissions of each party if and when I consider them to provide assistance and clarity.

Earlier mark	Application
<p><i>Class 29: Plant protein; plant protein derived from soya, rice and peas; soya [prepared]; meat substitutes derived from plant protein; meat substitutes; formed textured vegetable protein for use as a meat substitute; vegan burgers; vegan sausages; vegan minced meat substitute; vegan meatballs; prepared ready cooked meals consisting principally of meat substitutes; milk products; milk substitutes.</i></p>	<p><i>Class 29: Meat substitutes; poultry substitutes; seafood substitutes; soy based meat substitutes; soy based poultry substitutes; soy based seafood substitutes; meat substitutes made from texturized vegetable protein; poultry substitutes made from texturized vegetable protein; seafood substitutes made from texturized vegetable protein; vegetable based meat substitutes; vegetable based poultry substitutes; vegetable based seafood substitutes; refrigerated and frozen prepared entrees consisting primarily of vegetables; refrigerated and frozen prepared entrees consisting primarily of meat substitutes; refrigerated and frozen prepared entrees consisting primarily of poultry substitutes; refrigerated and frozen prepared entrees consisting primarily of seafood substitutes.</i></p>

21. 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”.

22. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(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.

23. It has also been established by the GC in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that:

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

24. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

25. In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.

26. The contested mark includes *meat substitutes*. This is identically contained in the earlier mark. The contested mark also contains *poultry substitutes*. Poultry is a type meat (as opposed to a type of fish). The contested *poultry substitutes* is therefore included in the more general category of *meat substitutes*, and is subsequently identical under the *Meric* principle.

27. The contested *soy based meat substitutes; soy based poultry substitutes; meat substitutes made from texturized vegetable protein; poultry substitutes made from texturized vegetable protein; vegetable based meat substitutes; vegetable based poultry substitutes; refrigerated and frozen prepared entrees consisting primarily of meat substitutes; refrigerated and frozen prepared entrees consisting primarily of poultry substitutes* are all foods that are provided as a substitute to meat, and would fall within the general category of the earlier mark's *meat substitutes*. They are therefore identical under the *Meric* principle.

28. The contested mark includes *refrigerated and frozen prepared entrees consisting primarily of vegetables*. Such prepared meals would appear the obvious choice for consumers looking to avoid meat and fish. However, such meals are also frequently eaten by people who also eat meat and fish. The choice to eat vegetables is not limited to the consumers who avoid meat, fish or dairy (e.g., vegans and vegetarians). Rather, eating vegetables and meals made from vegetables is an obvious and healthy choice for human omnivores. I do not, therefore, consider them to be a *meat substitute* in the same way as something that is made from soy or nut etc., which is purposely designed to mirror the taste and feel of meat without having to consume the animal. Nevertheless, I do not discount the probability that the contested *refrigerated and frozen prepared entrees consisting primarily of vegetables* will also (perhaps even predominantly) be eaten by the type of consumer looking to avoid meat and fish. Therefore, the end user and intended purpose of the goods at issue are the same. Also, the respective goods may be complementary and/or in competition. The contested *refrigerated and frozen prepared entrees consisting primarily of vegetables* are considered to be similar to a degree that is between low and medium.

29. The remaining contested goods are all types of seafood substitute. It appears to me that the goods of the earlier mark focus more on substitutes for meat products, or are simply proteins created by plants, beans or rice etc., that are not necessarily substitutes for either meat or fish. For example, the earlier mark's *plant protein* could be in the form of a protein shake or powder, without being a meal ingredient/substitute in the same way as the earlier mark's *vegan meatballs* would be. The contested *seafood substitutes; soy based seafood substitutes; seafood substitutes made from texturized vegetable protein; vegetable based seafood substitutes; refrigerated and*

*frozen prepared entrees consisting primarily of seafood substitutes* are not identically contained within the earlier mark, nor do the goods appear to fall within a more general category of goods of the earlier mark, or vice versa. That having been said, I find there to be a degree of similarity between meat substitutes and seafood substitutes. The nature and intended purpose of each is to act as a replacement for people wishing to avoid eating animal/fish produce. The respective goods will also likely be found next to each other on shelves and in freezers in supermarkets. They are therefore in competition and have the same channels of trade. The contested *seafood substitutes; soy based seafood substitutes; seafood substitutes made from texturized vegetable protein; vegetable based seafood substitutes; refrigerated and frozen prepared entrees consisting primarily of seafood substitutes* are considered to be similar to the goods of the earlier mark to a degree that is between low and medium.

### **Comparison of the marks**

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

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

31. It would be wrong, therefore, to dissect the trade marks artificially, 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.

32. The respective trade marks are shown below:

Earlier mark	Application
<b>MEATLESS FARM</b>	<b>MEATLESS KITCHEN</b>

33. The earlier mark consists of the combination of words MEATLESS FARM. Both words are recognised English language words, with the adjective MEATLESS being understood as meaning without meat, and the noun FARM being understood as an area of land with buildings, designed to grow crops and/or raise animals. The word FARM is also recognised as a verb, meaning to grow crops or keep animals. Due to the fact that the combination of words MEATLESS FARM follow the rules of English grammar, insofar as the adjective describes the noun, I consider the word FARM to most likely be understood as referring to a place (noun) rather than an action (verb). Due to its obvious accordance with the rules of English grammar, I believe the combination MEATLESS FARM will be perceived to hang together to describe a farm that has no meat (animals), or does not raise or cultivate cattle. Neither of the two words can be considered to be more distinctive than the other, and because they are of equal size, I do not consider either word to be more dominant. The overall impression of the earlier mark therefore derives from the combination of words 'MEATLESS FARM', which is also where any distinctiveness lies.

34. The contested mark consists of the combination of words MEATLESS KITCHEN. Both words are recognised English language words, with the adjective MEATLESS having already been defined, and the noun KITCHEN being understood as a room primarily used for cooking. Due to the combination of words MEATLESS KITCHEN following the rules of English grammar, insofar as the adjective describes the noun, the combination MEATLESS KITCHEN will be perceived to hang together to describe a kitchen that has no meat in it, or a place where meat is not cooked. Neither word can be considered to be more distinctive than the other, and because they are of equal size, I do not consider either word to be more dominant. The overall impression of the earlier mark therefore derives from the combination of words 'MEATLESS KITCHEN', which is also where any distinctiveness lies.

### **Visual similarity**

35. Visually, the marks are similar insofar as they each contain the word 'MEATLESS'. The marks therefore coincide as to their respective first elements. This is the extent of the visual similarity.

36. The marks differ visually as to their respective second elements, which are markedly different. The earlier mark contains the word FARM, whilst the contested mark contains the word KITCHEN.

37. The marks are considered to be visually similar to a medium degree.

### **Aural similarity**

38. Aurally, the marks are similar insofar as they each begin with the identical two-syllable sound MEAT-LESS. This is the extent of the aural similarity.

39. The marks differ aurally due to their respective second elements. The second element in the earlier mark is the single-syllable sound FARM, whilst in the contested mark it is the two-syllable sound KIT-CHEN.

40. The marks are considered to be aurally similar to a medium degree.

### **Conceptual similarity**

41. The earlier mark hangs together to create the overall impression of a farm that does not keep cattle/animals. By process of elimination, the perception of the type of farm will most likely be one that grows crops, i.e., an arable farm. The contested mark also hangs together, in this instance creating the overall impression of a kitchen that does not contain or cook with meat.

42. The marks are conceptually similar to the extent that they both present the notion of something that does not relate to or contain meat. The concept of the particular place which does not relate to or contain meat differs in each mark, with it being a farm in the earlier mark and a kitchen in the contested mark.

43. In my opinion, the term MEATLESS will most likely be perceived as describing a characteristic of the goods at issue. Nevertheless, due to the element MEATLESS

being identically replicated as the first element in each mark, the marks are considered to be conceptually similar to a medium degree

### **Average consumer and the purchasing act**

44. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.<sup>3</sup> 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.”

45. Other than for the *refrigerated and frozen prepared entrees consisting primarily of vegetables, and plant protein; plant protein derived from soya, rice and peas; soya [prepared]*, both of which are consumed by the majority of average consumers as part of their balanced diet, the goods at issue will most likely be purchased by vegan and vegetarian consumers. Even though vegan and vegetarian products often cost more than their non-vegan/vegetarian counterparts, and although the price of food can range considerably depending on the quality or ingredients of the product, on the whole food is considered to be an everyday product that tends to fall within a generally affordable price range of inexpensive items.

46. It should be noted that the price of a product is generally immaterial in defining the relevant public, as the price of the goods is not the subject of the registration.<sup>4</sup> That having been said, I believe vegan and vegetarian consumers tend to display a higher-

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<sup>3</sup> *Lloyd Schuhfabrik Meyer*, Case C-342/97

<sup>4</sup> *Bang & Olufsen A/S v OHIM*, T-460/05



than-average degree of attention when selecting food products, as they are highly attentive to the ingredients contained within the products they eat and drink. I believe that vegan and vegetarian consumers spend more time examining the products they wish to ingest than the non-vegan/non-vegetarian does, because it is important for them to know that a consumable does not contain an ingredient that would otherwise contravene their desire to avoid something that in their opinion has exploited an animal.

47. Nevertheless, and overall, I consider the level of attention in relation to the goods at issue to be no more than medium. This is based on an overall balance of all possible types of relevant consumer for the goods at issue. It must first be noted that some of the goods at issue are not specifically aimed at vegan or vegetarian consumers, e.g., *milk products* and *refrigerated and frozen prepared entrees consisting primarily of vegetables*. It should also be noted that some consumers who otherwise do not habitually follow a vegan/vegetarian diet may still nevertheless choose to eat a vegan/vegetarian product on occasion, in order to reduce their meat/fish consumption. Such a consumer would not, in my opinion, display the same level of scrutiny of the products ingredients as a strict vegan/vegetarian would. I am also aware that the degree of strictness of an actual vegan/vegetarian will vary, as will their respective inspection of a product's packaging.

48. Ultimately, although a vegan and vegetarian diet is a strongly held personal preference, it is essentially one of choice rather than necessity, and so does not automatically require the same degree of consumer attention that a medical or dietary requirement would, for example. That having been said, I do not discount the possibility that there may also be a certain number of consumers who are indeed forced to follow a non-meat/non-fish diet due to certain health issues, and therefore subsequently would display a higher degree of attention.

49. Based on the nature of the goods at issue, I consider it most likely that the purchasing process will be visually dominated. The consumer would predominantly encounter the goods in a retail establishment or an online store, and will therefore most likely be making a purchasing decision based on the visual appearance of the product. I do not entirely discount the possibility that the marks may be spoken, for instance whilst engaging with a sales assistant in conversation, and as such I accept

that there may be an aural element to the purchasing process. However, I believe any aural aspect to generally be secondary to a visual one in the purchasing process.

### **Distinctive character of the earlier trade mark**

50. In its submissions in lieu of a Hearing, the Opponent claimed that it had made substantial sales of products since the launch of its mark MEATLESS FARM. The Opponent also submitted that it had made "... extensive use of the mark to build reputation and distinctiveness within the market in the use of 'meatless' within the context of a brand name", and had undertaken significant marketing to create a distinctive brand. However, the Opponent has not filed any of its own evidence of use during the proceedings that may corroborate these submissions or substantiate such a position in the market, whilst the contentions provided by the Opponent in its submissions in lieu amount to evidential material that cannot be considered. Although the Opponent referred to an extract from the Applicant's evidence in order to support its position of having a distinctive earlier mark, I am of the opinion that one exhibit is insufficient in and of itself to be persuasive in this regard, especially when I keep in mind that the purpose of the Applicant's exhibit was to prove that the word MEATLESS is descriptive. My assessment of the degree of distinctive character of the earlier mark is therefore to be made on the basis of its inherent features only.

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

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

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

52. In *Kurt Geiger v A-List Corporate Limited* BL O-075-13, Mr Iain Purvis K.C., acting as the Appointed Person, pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

53. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

54. The earlier mark contains the common English-language words MEATLESS and FARM. In isolation, the element MEATLESS would have a directly descriptive relationship to the goods at issue. This is not simply my contention, rather, it is an overall reflection of the submissions of both parties. For example, the Applicant's evidence pointed to the descriptive meaning of the term MEATLESS, whilst the Opponent itself did not deny that the term means to refer to a lack of meat. Instead, it acknowledged the term is a synonym for meat-free. It is also arguable that the element FARM is either directly descriptive or at least non-distinctive of a characteristic of the goods at issue. This is because it is a commonly understood English-language word that refers to a place where animals are raised and/or plants are cultivated. The Applicant went slightly further by submitting that the word FARM is associated with the production of food.

55. However, as I have previously explained, the earlier mark accords with the rules of English grammar and hangs together as a combination. It is therefore within the combination as a whole where any distinctiveness would lie. In my opinion, the combination of words creates the overall impression of a farm which does not keep animals or use meat in any way. In other words, it is a meat-free/meatless farm. The Opponent contended that the concept of a meatless farm is "against societal norms and therefore [has] a distinctive overall impression." I disagree with the submission that it is against societal norms, as essentially a meatless farm is elementarily an arable farm. Considering that the goods at issue consist largely of meat substitutes (and are therefore meatless), or in the alternative are products made from vegetables (and are therefore also meatless), the concept of a farm that creates/produces/grows meatless produce is not, in my opinion, distinctive to a particularly high degree.

56. In *Formula One Licensing BV v OHIM*, Case C-196/11P, the Court of Justice of the European Union found that:

"41...it is not possible to find, with regard to a sign identical to a trade mark protected in a Member State, an absolute ground for refusal, such as the lack of distinctive character, provided by Article 7(1)(b) of Regulation No 40/94 and Article 3(1)(b) of Directives 89/104 and 2008/95. In this respect, it should be noted that the characterisation of a sign as descriptive or generic is equivalent to denying its distinctive character.

42. It is true that, as is clear from paragraph 48 of the judgment under appeal, where an opposition, based on the existence of an earlier national trade mark, is filed against the registration of a Community trade mark, OHIM and, consequently, the General Court, must verify the way in which the relevant public perceives the sign which is identical to the national trade mark in the mark applied for and evaluate, if necessary, the degree of distinctiveness of that sign.

43. However, as the appellant rightly points out, their verification has limits.

44. Their verification may not culminate in a finding of the lack of distinctive character of a sign identical to a registered and protected national trade mark, since such a finding would not be compatible with the coexistence of Community trade marks and national trade marks or with Article 8(1)(b) of Regulation No 40/94, read in conjunction with Article 8(2)(a)(ii).”

57. It therefore must be held that the earlier mark possesses at least a minimum degree of distinctive character. In my opinion, the minimum degree of distinctive character is the extent of the distinctiveness of the earlier mark, which is reliant entirely upon the overall impression created by the combination of its otherwise independently descriptive and/or non-distinctive elements.

### **Likelihood of confusion**

58. 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 goods and services down to the responsible undertakings being the same or related.

59. 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 (see *Sabel*, C-251/95, para 22). 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 (see *Canon*, C-39/97, para 17). It is necessary for me to keep in mind the

distinctive character of the Opponent's trade mark, the average consumer for the 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.

60. In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, the GC stated that:

“49. However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

61. In *Quelle AG v OHIM*, Case T-88/05, the GC found that visual similarity (and difference) is most important in the case of goods that are self-selected or where the consumer sees the mark when purchasing the goods. The Court stated that:

“68... If the goods covered by the marks in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs (*NLSPORT*, *NLJEANS*, *NLACTIVE* and *NLCollection*, paragraph 53 supra, paragraph 49).

69. Likewise, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (*BASS*, paragraph 56 supra, paragraph 55, and Case T-301/03 *Canali Ireland v OHIM – Canal Jean (CANAL JEAN CO. NEW YORK)* [2005] ECR II-2479, paragraph 55)... The same is true of catalogue selling, which involves as much as does shop selling a visual assessment of the item purchased by the consumer, whether clothing or shoes, and does not generally allow him to obtain the help of a sales assistant. Where a sales discussion by telephone is possible, it takes place usually only after the consumer has consulted the catalogue and seen the goods. The fact that those products may, in some circumstances, be the subject of discussion between consumers is therefore irrelevant, since, at the time of purchase, the goods in question and, therefore, the marks which are affixed to them are visually perceived by consumers.”

62. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the General Court noted that the beginnings of word tend to have more visual and aural impact than the ends. The court stated:

“81. It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters ‘lo’ which characterise the earlier marks and which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter ‘r’, which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root ‘mundico’ in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter ‘r’ at the end of the two signs. Given those similarities, the applicant’s argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

82. As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

83. Second, the first two syllables of the opposing signs forming the prefix 'mundi' are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.

63. Having conducted a full analysis and thorough comparison of both the marks and their respective goods at issue, I have determined that it is the visual considerations which are of a greater importance in the assessment of a likelihood of confusion, due to the purchasing process of the respective goods being visually dominated. In this regard, I refer to the fact that I have found the marks to be visually similar to a medium degree. It should not be forgotten that I have not discounted the aural impact of the marks in the purchasing process, in which case I refer to the fact that I have found the marks to be aurally similar to a medium degree, also.

64. In conducting my comparison of the marks at issue, I must keep in mind that determining whether there is a likelihood of confusion is a multifactorial assessment that includes the interdependency principle, whereby 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<sup>5</sup> (see *Canon, C-39/97*, para 17). I am cogent to the fact that I have found all of the contested goods to be either identical to the goods of the earlier mark, or in the alternative at least similar to between a low and medium degree. According to the principle of interdependency, such a degree of similarity between the respective specifications of goods could offset a lesser degree of similarity between the respective trade marks.

65. With the above principles in mind (e.g., those established in *Canon; New Look Limited; Quelle AG and El Corte Inglés*), it would appear that the marks at issue would indeed likely be confused. However, in my opinion, coming to such a conclusion would be flawed, and too heavily reliant on a formulaic and artificial adherence to the wording

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<sup>5</sup> *Canon, C-39/97*, para 17



of the principles, rather than a balanced and realistic assessment of the perception of the marks in the minds of the average consumers. It is true that the marks share the identical first element MEATLESS, the effect of which is that they are visually and aurally similar to a medium degree. However, the element which they share has been found to be entirely descriptive in relation to the goods at issue. Indeed, both parties have submitted as much (using different ways to express the same), and this reflection cannot, therefore, be in doubt or disputed.

66. By comparing MEATLESS FARM with MEATLESS KITCHEN it appears to me to be relatively clear and obvious that it is the descriptive element MEATLESS in each mark which is where any similarity between the marks rests. This is because the second elements in each mark, i.e., KITCHEN and FARM respectively, are self-evidently neither visually, aurally nor conceptually similar to any degree. I note the Opponent argued that the marks are conceptually similar because kitchens obtain produce from farms, and therefore a supply-chain connection could be inferred. However, in my opinion this is a strained connection which would not be immediately obvious to an average consumer.

67. The issue of marks which share common descriptive elements has been assessed previously. In *L'Oréal SA v OHIM*, Case C-235/05 P, the Court of Justice of the European Union found that:

“45. The applicant’s approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the

nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

68. The *L’Oréal* judgment indicated that a likelihood of confusion is not automatically precluded by virtue of the marks only having in common a descriptive word. However, the previously mentioned *Lloyd Schuhfabrik Meyer & Co*, judgment indicated that descriptive and/or non-distinctive matter is generally given less weight when comparing marks. Also of note is the finding of Mr Justice Arnold (as he then was) in *Whyte and Mackay Ltd, v Origin Wine UK Ltd* [2015] F.S.R. 33., whereby he stated in paragraph 44:

“...what can be said with certainty is that, if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion.”

In addition, in *Nicoventures Holdings Limited v The London Vape Company Limited* [2017] EWHC 3393, Mr Justice Birss (as he then was), having agreed with Arnold J’s statement of principle above, stated:

27. “...If the only similarity between two marks arises from common elements which have low distinctiveness (alone and as a combination) then that tends to weigh against a finding of likelihood of confusion. Such a situation does not preclude a finding of likelihood of confusion but it is a relevant factor and in an appropriate case it may be decisive.”

...

31. “The nature of the common elements needs to be considered and in a case like this, in which the common elements are elements which themselves are descriptive and non-distinctive (as the Hearing Officer found in paragraph 34), it is necessary somewhere to focus on the impact of this aspect on the likelihood of confusion. As has been said already it does not preclude a likelihood of confusion but it does weight against it. There may still be a likelihood of

confusion having regard to the distinctiveness and visual impact of the other components and the overall impression but the matter needs to be addressed.”

69. The Applicant itself referred to case law discussing the notion of common descriptive elements, and referred to the judgment *European Ltd v Economist Newspapers Ltd* [1998] E.M.I.R. 536 [1998] FSR 283:

“The function of a trade mark is to serve as an indication of the trade origin of the goods to which it is applied. I do not understand the concept of a trade mark which has as its essential feature a word or phrase which does not perform this function because it is not in itself distinctive of the origin of the goods. ... *But in my judgment any contention on behalf of the plaintiff that the word ‘European’ forms an essential feature of its registered trade mark which distinguishes the origin of its newspaper would almost inevitably lead to the very monopoly which it disclaims, and the judge was rightly reluctant to accept this. Where descriptive words are included in a registered trade mark, the courts have always and rightly been exceedingly wary of granting a monopoly in their use.*”

With the above in mind, I am of the opinion that the term MEATLESS has the same impact and standing in the respective marks at issue as the term ‘European’ had in the *European Ltd* judgment.

70. The cited judgments provide a degree of clarity as to the thought process for assessing the likelihood of confusion in relation to the marks at issue MEATLESS KITCHEN v MEATLESS FARM. In light of the fact that the second elements in each mark are strikingly different, as are the overall impressions of each mark, I find that the degree of similarity between the two marks to be limited exclusively to the sharing of a descriptive element, which, as indicated in the cited judgments, tends to point against a finding of confusion.

71. In *Whyte and Mackay Ltd* Arnold J. (as he then was) considered the impact of the CJEU’s judgment in *Bimbo*, C-591/12P, on the court’s earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for

which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

72. Based on the above, the first stage for finding a likelihood of confusion would be to establish that the average consumer considers the shared element MEATLESS to have an independent and distinctive role within each mark. As agreed by both parties, the term MEATLESS is descriptive (or rather a synonym of meat-free, which is entirely

descriptive), and therefore does not have independent distinctiveness. The second stage would be for the consumer to consider the distinctiveness of the shared element (in this case MEATLESS) to be separate from the distinctiveness of the mark(s) as a whole. As established, the shared term MEATLESS does not have independent distinctiveness, and any distinctiveness of the term is confined to that created by the overall impression of the marks as a whole. I have been careful to not entirely dismiss the distinctive character of the earlier mark as it is not my place to question it (see *Formula One Licensing BV*). However, based on the acceptance of both parties as to the descriptive nature of one of the two elements in each mark, I consider it reasonable to say that the possessing of the minimum degree of distinctive character is entirely dependant on the overall impression being considered to be greater than the mere sum of its individual parts.

73. As to the third stage considered by Arnold J, even if the shared element MEATLESS were considered to be independently and separately distinctive from the mark as a whole (which it is not), it would nevertheless not automatically follow that there is a finding of confusion.

74. Although the marks at issue share the first element, the element that they share does not possess independent distinctive character. Rather, the element they share is entirely descriptive. A finding of a likelihood of confusion is therefore dependent on the assessment of the overall impression of each mark. By conducting such an assessment, it appears clear to me that the consumer is unlikely to directly mistake one mark for the other. This is because each marks contains undeniably different elements which create aural, visual and conceptual differences. Therefore, there is no likelihood of direct confusion.

75. Having found there to be no likelihood of direct confusion, any confusion would now be dependent on a finding of indirect confusion. It should be borne in mind that a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion.<sup>6</sup>

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<sup>6</sup> In *Liverpool Gin Distillery Limited v Sazerac Brands LLC [2021] EWCH Civ 2017*, paragraph 13, Arnold LJ approved this “consolation prize statement” as made by James Mellor KC’s (sitting as the Appointed Person) statement in *Cheeky Italian Ltd v Sutaria (O/219/16)* paragraph 16.

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

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

77. I agree with both parties submissions that the average consumer reads from left to right. In this regard, it is noted that the marks share in common their respective first element MEATLESS. I have previously explained my opinion that the combination of words in each mark follows the rules of English grammar composition and syntax, insofar as the adjective describes the subsequent noun. In the case of the shared term MEATLESS, it performs the same function in each respective mark, i.e., as an adjective describing a specific characteristic of either a farm or kitchen. This common element is not so strikingly distinctive (either inherently or through unsubstantiated use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. In addition, the elements which are different are not, in my opinion, the type of non-distinctive additional element that appear entirely logical and consistent with a brand extension, such as LITE or MINI, would be. To elaborate on this by way of example, I do not consider it likely that when encountering the mark MEATLESS FARM whilst picking up a packet of *frozen prepared entrees consisting primarily of meat substitutes*, the average consumer would misremember a previous mark they had seen on identical goods and assume they are provided by the same or economically linked undertaking simply because they both contain the entirely descriptive word MEATLESS. This is especially so for the vegan and vegetarian consumer who displays a heightened degree of attention, as they are more likely to notice the differences between the marks.<sup>7</sup>

78. In conducting the comparison of the marks, I have also kept in mind *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, in which Mr James Mellor Q.C. (as he then was) as the Appointed Person stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark, as this would be mere association rather than indirect confusion. In my opinion, the fact that the marks at issue share the descriptive element MEATLESS is

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<sup>7</sup> C-261/04 P, *Claude Ruiz-Picasso*,<sup>40</sup>: “Where it is established in fact that the objective characteristics of a given product mean that the average consumer purchases it only after a particularly careful examination, it is important in law to take into account that such a fact may reduce the likelihood of confusion between the marks relating to such goods at the crucial moment when the choice between those goods and marks is made”.

not enough, in and of itself, to find indirect confusion. The coincidence of the same term would not lead the average consumer to assume that the undertakings making use of the respective trade marks are one and the same. The element MEATLESS is not so distinctive that the average consumer would assume no-one else but the brand owner would be using it in a trade mark at all. Indeed, MEATLESS is not distinctive at all (as conceded by both parties), and the consumer would therefore unlikely call to mind all other occasions where they had seen this descriptive term on goods which do not contain meat and assume they belong to the same or an economically linked undertaking.

79. Having found there to be no direct confusion, there would need to be a “proper basis” for finding a likelihood of indirect confusion.<sup>8</sup> I believe that I have maintained the correct principles of law firmly in mind, and am of the opinion that upon seeing the contested mark the average consumer would not carry out the mental process whereby they either consciously or subconsciously assume the contested mark to be a logical extension of the earlier mark based purely on the coincidence of an entirely descriptive term. Further, I do not consider it realistic that the consumer would conclude the marks belong to the same brand owner or an economically linked undertaking because they share a descriptive term. This is especially so when the term is fundamental to creating an overall impression in each mark, which is notably conceptually different. I therefore find no likelihood of indirect confusion either.

## **Conclusion**

80. The opposition fails in its entirety. Subject to an appeal, the contested application may proceed to registration.

## **Costs**

81. As the opposition has failed, the Applicant has been successful and is entitled to a contribution towards its costs. I bear in mind that the relevant scale is contained in Tribunal Practice Notice 2/2016. In the circumstances I award the Applicant the sum

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<sup>8</sup> *Liverpool Gin Distillery Limited v Sazerac Brands LLC [2021] EWCH Civ 2017*, paragraph 13,



of £900 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering a notice of opposition and

filing a counterstatement	£350
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Preparing evidence	£550
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Total	£900
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82. I therefore order The Meatless Farm Limited to pay Hain Frozen Food UK Limited the sum of £900. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 1<sup>st</sup> day of November 2022**

**Dafydd Collins**

**For the Registrar**