

O/0109/23

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION
NO. 03572967 BY
CÉRÉLIA UK LTD
TO REGISTER THE TRADE MARK:



IN CLASS 30

AND


OPPOSITION THERETO
UNDER NO. 424636
BY
SHEETAL PATEL

BACKGROUND & PLEADINGS

1. Cérélia UK LTD (“**the applicant**”), applied to register the trade mark shown on the front page of this decision in the United Kingdom on 29 December 2020. It was accepted and published in the Trade Marks Journal on 26 February 2021 for the following goods and services:

Class 30: Cake batter; Cake dough; Cake doughs; Cake mixes; Cake mixtures; Cookie dough; Cookie mixes; Cookies; Pancake mixes; Pancakes; Pastry; Pastry cases; Pastry dough; Pastry mixes; Pastry shells; Pie crusts; Pizza bases; Pizza crust; Pizza crusts; Pizza dough; Pizza dough mix; Pizza mixes; Filo dough; Filo doughs; Filo pastry; Puff pastry; Shortcrust pastry; Gingerbread; Brownie dough; Brownie mixes; Frozen brownie dough; Frozen cookie dough; Frozen dough; Frozen pancakes; Frozen pastry; Frozen pastry sheets; Batter for making pancakes; Batter mixes.

2. Sheetal Patel (“**the opponent**”) opposes the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“**the Act**”). The opponent is the proprietor of the following mark:

Trade Mark no.	UK00002642049
Trade Mark	

Goods & Services Relied Upon	<p>Class 29: Hamburgers, cheeseburgers; chicken pieces (other than for animals); french fried potatoes; milk beverages the milk predominating, milk, eggs; hashed brown potatoes; sausages; fish; cheese; pickles; desserts; all included in Class 29.</p> <p>Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes.</p> <p>Class 43: Restaurant Services</p>
Relevant Dates	<p>Filing date: 14 November 2012</p> <p>Date of entry in register: 26 April 2013</p>

3. For the purpose of this opposition, the opponent, as shown above, relies on all goods and services in Classes 29, 30, and 43 of the earlier mark.

4. I note that the earlier mark now stands as an expired earlier mark on the Register, with the expiration date being 14 November 2022. However, the expired status of the mark does not negate the proceedings before me since it had not expired at the filing date of the opposed mark.

5. In her notice of opposition, the opponent claims the following:

“The names are too similar – our client is trading as Cakeaway and the other party as Bakeaway. The re-branding of the applicant means that the logos are similar as are the products offered.”

6. The applicant filed a notice of defence and counterstatement denying the claims made in relation to the similarity of the marks. It contends that the earlier mark “is dominated by the figurative elements of the mark, in

particular the colour, the cupcake character on wheels and the significant stylisation of the verbal element.” Also, the applicant denies any similarity between the respective goods and services. The applicant requested that the opponent provides proof of use of its earlier mark relied upon.

7. Both parties filed evidence in these proceedings. No hearing was requested and only the applicant filed written submissions in lieu of a hearing. I have read all the papers and shall refer to relevant points only to the extent warranted for the purpose of making this decision.
8. In these proceedings, the opponent is represented by Alison Law Solicitors and the applicant by Reddie & Grose LLP.
9. 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 Trade Marks Act relied on 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.

Relevant Date/Period

10. An “earlier trade mark” is defined in Section 6(1) of the Act:

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

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

[...]

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

11. As the earlier mark relied upon had been registered for more than five years on the date on which the contested application was filed, Section 6A of the Act applies, which states:

“(1) This Section applies where–

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

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

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

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

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

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

(5)-(5A) [Repealed]

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

12. In accordance with Section 6(1) of the Act, the opponent’s trade mark clearly qualifies as an earlier mark. The relevant period for proof of use of the opponent’s mark is **30 December 2015 to 29 December 2020**.
13. The relevant date for the assessment of likelihood of confusion as per Section 5(2)(b) is the date on which the contested application was filed, namely **29 December 2020**.

EVIDENCE

Opponent's Witness Statement

14. The opponent's evidence consists of a witness statement, dated 18 May 2022, of Sheetal Patel, who is the owner of the earlier mark, introducing Exhibits SP1-11. The main purpose of the evidence is to demonstrate that the earlier mark has been genuinely used in the UK for the relevant period.

Applicant's Evidence

15. The applicant's evidence consists of two witness statements dated 20 July 2022:
 - a. of Jan Boers, who is the Country Director for the applicant, holding this position since 2016 when HOUSE OF VANTAGE LIMITED (now named C  r  lia UK LTD) became part of C  R  LIA GROUP, introducing Exhibits JB01-JB08. Much of this evidence is of limited relevance or assistance since it largely just describes the applicant's business and use of the applied for mark, and states that it is not aware of any instances of actual confusion;
 - b. of Isabelle Amy Tate, who is the trainee trade mark attorney at Reddie & Grose LLP, the Representative for the Applicant in this matter, holding this position since 10 September 2018, introducing Exhibit IAT01. Ms Tate's evidence relates to the results of her Internet search for 'cakeaway', and it is not entirely clear what purpose that evidence serves.
16. I have read and considered all of the evidence and will refer to the relevant parts at the appropriate points in the decision.

DECISION

Proof of Use

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

“114. [...]The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C 416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I 4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

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

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

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

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

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

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

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d)

the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus, there is no de minimis rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

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

18. The onus is on the proprietor of the earlier mark to show use. This is in accordance with Section 100 of the Act, which states:

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

19. Proven use of a mark which fails to establish that “the commercial exploitation of the marks is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is, therefore, not genuine use.

Genuine Use

20. As indicated in the case law cited above, use does not always need to be quantitatively significant to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as “warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.

21. In making my determination as to whether the evidence presented shows the necessary genuine use, I also take account of judicial comment as to probative and evidential issues in such cases. In *Awareness Limited v Plymouth City Council*, Case BL O/230/13, Daniel Alexander KC sitting as the Appointed Person stated that:

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

22. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs KC, sitting as the Appointed Person stated that:

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

23. In *Naazneen Investments Ltd v OHIM*, Case T-250/13,¹ the General Court upheld a decision by the OHIM Board of Appeal that the sale of EUR 800 worth of non-alcoholic beverages under a mark over a five year period, which had been accepted was not purely to maintain the trade mark registration, was insufficient, in the economic sector concerned, for the purposes of maintaining or creating market share for the goods covered by that Community trade mark. The use was therefore not genuine use. The relevant part of the judgment of the General Court is as follows:

“46. In the fifth place, the applicant argues that, in accordance with the case-law cited in paragraph 25 above, use of a trade mark is to be regarded as token if its sole purpose is to preserve the rights conferred by the registration of the mark. It claims that the Board of Appeal contradicted itself by stating, on the one hand, in paragraph 31 of the contested decision, that the total amount of transactions over the relevant period seemed to be token, and by stating, on the other hand, in paragraph 42 of the contested decision, that it did not doubt the intention of the proprietor of the mark at issue to make real use of that mark in relation to the goods in question.

47. In this connection, suffice it to point out that the applicant’s argument is based on an incorrect reading of the contested decision.

¹ The judgment of the General Court was upheld on the appeal to the CJEU. In this regard, see Case C-252/15 P.

The Board of Appeal used the term 'token' to describe the total amount of transactions, approximately EUR 800, and not to categorise the use of the mark at issue.

48. In the sixth place, the applicant claims that the Board of Appeal, by relying solely on the insufficient use made of the mark at issue, did not comply with the case-law according to which there is no quantitative threshold, determined a priori and in the abstract, that must be chosen in order to determine whether use is genuine. The Board of Appeal also failed to comply with the case-law according to which even minimal use may be sufficient in order to be deemed genuine.

49. According to the case-law, the turnover achieved and the volume of sales of the goods under the mark at issue cannot be assessed in absolute terms but must be assessed in relation to other relevant factors, such as the volume of commercial activity, the production or marketing capacities or the degree of diversification of the undertaking using the trade mark and the characteristics of the goods or services on the relevant market. As a result, use of the mark at issue need not always be quantitatively significant in order to be deemed genuine (see, to that effect, judgments in *VITAFRUIT*, cited in paragraph 25 above, EU:T:2004:225, paragraph 42, and *HIPOVITON*, cited in paragraph 27 above, EU:T:2004:223, paragraph 36). Even minimal use can therefore be sufficient in order to be deemed genuine, provided that it is warranted, in the economic sector concerned, to maintain or create market shares for the goods or services protected by the mark. Consequently, it is not possible to determine a priori, and in the abstract, what quantitative threshold should be chosen in order to determine whether use is genuine. A *de minimis* rule, which would not allow OHIM or, on appeal, the General Court, to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, to that effect, order of 27 January 2004 in *La Mer Technology*, C-259/02, ECR, EU:C:2004:50,

paragraphs 25 and 27, and judgment of 11 May 2006 in *Sunrider v OHIM*, C-416/04 P, ECR, EU:C:2006:310, paragraph 72).

50. In the present case, contrary to what the applicant claims, the Board of Appeal did not determine a minimum threshold ‘a priori and in the abstract’ so as to determine whether the use was genuine. In accordance with the case-law, it examined the volume of sales of the goods in question in relation to other factors, namely the economic sector concerned and the nature of the goods in question.

51. The Board of Appeal accordingly took the view that the market for the goods in question was of a significant size (paragraph 28 of the contested decision). It found also that the goods in question, namely non-alcoholic beverages, were for everyday use, were sold at a very reasonable price and that they were not expensive, luxury goods sold in limited numbers on a narrow market (paragraph 29 of the contested decision). Furthermore, it took the view that the total amount of transactions over the relevant period, an amount of EUR 800, seemed to be so token as to suggest, in the absence of supporting documents or convincing explanations to demonstrate otherwise, that use of the mark at issue could not be regarded as sufficient, in the economic sector concerned, for the purposes of maintaining or creating market shares for the goods covered by that mark (paragraph 31 of the contested decision).

52. It is therefore apparent, contrary to what the applicant claims, that it was in accordance with the case-law cited in paragraph 49 above that the Board of Appeal took the view that, in the present case, minimal use was not sufficient to be deemed genuine.”

24. In *JUMPMAN Trade Mark*, BL O/222/16, the Appointed Person upheld a Hearing Officer’s finding that sales of around 55,000 pairs of trainers over a 16-month period were insufficient to qualify as genuine use for an EUTM registration.

25. I include these extracts from case law merely as examples of instances where certain levels of sales have been insufficient to establish genuine use, but clearly, each case must be determined on its own merits, facts and relevant factors, and I do not overlook that the relevant territory in the present case is not the EU, but the smaller territory of the UK.

Consideration of the evidence of use in this case

26. The opponent's evidence comprised a witness statement of Sheetal Patel, dated 18 May 2022, who is the opponent in these proceedings, with 11 Exhibits. Her evidence comes from her own knowledge. In its submissions in lieu, the applicant has challenged all the Exhibits providing a thorough list of deficiencies. Ms Patel confirms that she "has been using [her] logo under the brand (Cake away) since 2012". I note the following points from the evidence:
27. **Exhibit SP1:** Ms Patel states that she has a shop in Manchester and five branches based in Didsbury, Wigan, two in Bolton, and two in Accrington. The opponent provides undated photos, which are said to show the shop front in Manchester and a delivery car. In the circumstances, it is unclear when these photos were taken and whether they fall within the relevant date. **Such shortcomings limit the evidential value of Exhibit SP1.**
28. **Exhibit SP2** is stated to be screenshots, as shown below, of the opponent's website which is said to have been in existence "for many years."



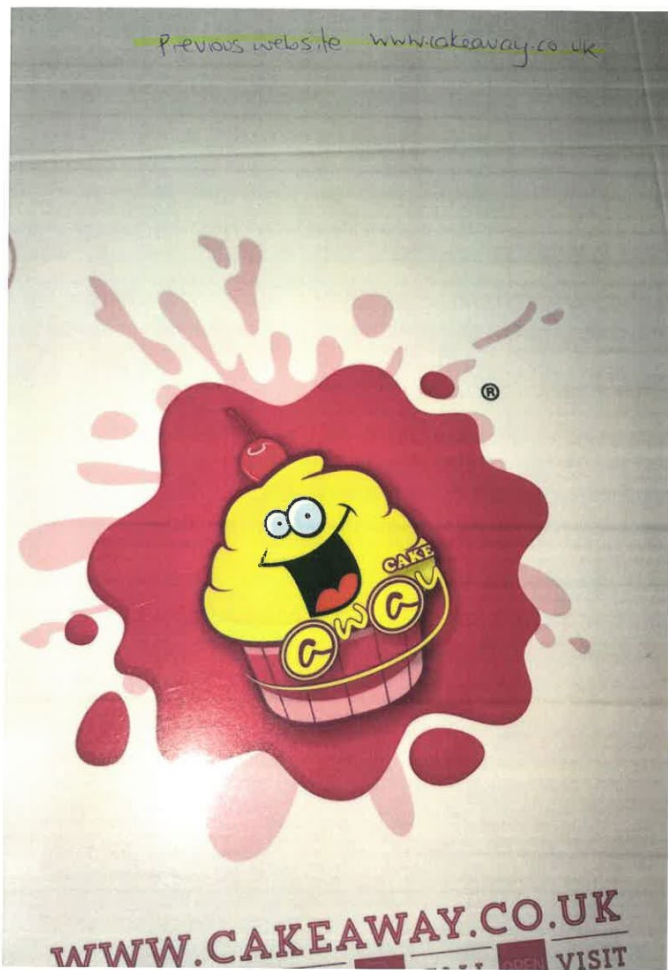
Cakeaway - Cake Shop in Didsbury
cakeaway.business.site

Shop for similar

- £51.99 - £64.99 Joseph Joseph Elevate Car... Very.co.uk 4.0
- £8.20 Mandala Kitchen Utensils S... Etsy Free Delivery
- £28.49 Lakeland Everyday Kitchen ... Lakeland

Related content

- 6:26 It Dish in 10 min With No Choice



I note that the above screenshots are undated, and Ms Patel does not expressly state the period for which the previous website, namely

www.cakeaway.co.uk, was in operation. In light of this, **such shortcomings limit the evidential value of Exhibit SP2.**

29. **Exhibit SP3:** Although Ms Patel states that the screenshots provided show the website relating to her Bolton branch, the Exhibit is again undated, and no web address appears on the files, except for a handwritten note of the presumed web address. **Such shortcomings limit the evidential value of Exhibit SP3.**

30. **Exhibit SP4:** Ms Patel provides screenshots of her online menu from her Bolton branch, where the earlier mark appears at the top of the first page. The menu lists various goods, including milkshakes, sundaes, slushies, cupcakes, cakes and desserts, waffles, pancakes, crepes, and cookies. I note in this instance again that the materials filed are all undated, and the website address is missing. **Such shortcomings limit the evidential value of Exhibit SP4.**

31. **Exhibit SP5** is stated to be screenshots in relation to JWP24 Limited with registration number 09265052 from the Companies House website. In her witness statement, Ms Patel states that:

“My logo is used in connection with my business, JWP24 Limited, companies house registration number 09265052. I exhibit SP/05 as copies of my company information and accounts dating back to 2014 when the Company was incorporated”.

The applicant with its submissions highlights the following:

“This is a rather vague statement. The witness does not provide information as to whether all business of JWP24 Limited is conducted under the registered mark or whether JWP24 Limited is also used in relation to business conducted under other trade marks. For example, the company was incorporated on 15 October 2014 which is almost two years after the Opponent applied for its registered mark and so it

is not clear that the company solely relates to trade under the Opponent's registered mark.

[...]

The buying and selling of own real estate appears completely unrelated to the goods and services of the registered mark.^[2]

The company accounts exhibited provide no concrete evidence as to the extent of trade carried out under the registered mark during the relevant period. JWP24 Limited was entitled to exemption under section 477 of the Companies Act 2006 relating to small companies. The accounts provided show limited information. For example, there are no turnover figures. Moreover, there is no information provided as to the break down of the business (and any figures provided) of JWP24 Limited in relation to each of the individual goods and services covered by the Opponent's mark.”

Whilst the opponent makes no specific reference to consent, consent may be inferred, in certain circumstances, from the facts and circumstances of the case.³ In the present case, it is clear from the said Exhibit that the opponent/witness is the director of the JWP24 Limited. Therefore, it can be inferred from the facts of this case that the opponent consented to the use of the registered mark by JWP24 Limited. As to the company account details provided with this Exhibit, there are no turnover figures/details of the company. To that extent, it is not possible to determine the total sales of the goods and services under the earlier mark. Thus, **the content of Exhibit SP5 shows nothing as to the position during the relevant period.**

32. **Exhibit SP6** consists of:

² The Companies House information shows that part of the opponent's business is in relation to buying and selling of own real estate.

- a. screenshots from the Instagram account 'cakeawaymcr' where the earlier mark is shown in the profile picture. In her witness statement, Ms Patel states that her *"Instagram page dating back to 2012 when my logo was first registered. The screenshots cover the relevant period requested by the Applicants. As you will see I have a following of over 77,000. I have also enclosed a screenshot of my twitter page that was set up in 2015."* I note that the screenshot is undated and shows various details of the Instagram profile, for example, the webpage www.cakeaway.co.uk and two locations, namely Didsbury and Bolton. Further, only a single screenshot falls within the relevant period, namely 26 February 2016, which depicts the cover page of a menu bearing the earlier mark as follows:



In its submissions, the applicant submits that: *"However, the post itself is not related to goods and services of registration but rather concerns a lost phone. A takeaway menu is shown in the background but there is no further evidence relating to the menu*

which would give this item any probative value." I note that the given screenshot at least falls within the relevant date. However, the content of the menu is not shown, and the post is focusing on the lost phone. As for the rest of the screenshots, which I have considered, relating to the Instagram page, I note that although some of them illustrate goods that bear the earlier mark as registered, they are either undated or outside the relevant period. For example, two screenshots show the earlier mark on milkshake and cookies products, dated 4 December 2015 and 14 March 2015, respectively. While it may be inferred that the given goods were sold under the earlier mark as registered, these items of evidence pre-date the relevant period. In addition, the following undated screenshots illustrate goods under a different form of the earlier mark, namely the sole element of a cupcake device:





- b. an undated screenshot from the Twitter page 'CAKEAWAYMCR' with 699 followers and a 'Join Date' being July 2015. I also note that the Exhibit contains a post, as shown below, from 7 July 2016 without featuring the earlier mark as registered but the single element of a cupcake device.

twitter

BROWNIES
WAFFLES
DIPPED STRAWBERRIES

COOKIES
CREPES

Following

CAKEAWAYMCR
@CAKEAWAYMCR

MCR's best dessert, cake & shake delivery service. All products made instore fresh daily! 244 Fog Lane, Didsbury, MCR, M206EL. 01614550800
Instagram: CakeawayMcr

Manchester, England cakeaway.co.uk

Joined July 2015

153 Following 699 Followers

Tweets Tweets & replies Media Like

CAKEAWAYMCR @... · 07/07/2016
Be sweeter than a strawberry with out berry shake!
#Cakeaway #Milkshake
#Manchester #Strawberrv

For the reasons given above, the shortcomings limit the evidential value of Exhibit SP6.

33. **Exhibit SP7** is stated to be screenshots from the 'CakeAway' Facebook page. Ms Patel states that:

"[the] cake away brand has nearly 10,000 followers from all over the UK. My brand Cake Away is an established and well-known brand that is associated with my registered logo. The photos within this exhibit clearly show that all my food and drink items clearly use my logo on the packaging and the logo is imprinted onto wafer biscuits to add the brands personal character to each dish. Even my packaging has my logo on. Furthermore, I sell my logo imprinted merchandise such as mugs."

I note that most screenshots are undated, containing goods such as cookies, milkshakes, and cakes. It is not possible from the exhibited materials to determine whether the followers mentioned in the witness statement originate from the UK. Moreover, the only date that can be extracted from a set of screenshots is 16 May, with no indication of the year. Again, I note that the exhibited screenshots in this instance contain the same different form of the registered mark, namely the cupcake device, as shown previously in Exhibit SP 6. **The shortcomings limit the evidential value of Exhibit SP7.**

34. **Exhibit SP8** is said to be two screenshots from the Just Eat website and cakeawaymanchesteronline.co.uk. I note that both screenshots are undated, and there is no visible web address. However, the earlier mark appears in both screenshots. In this instance again, **the shortcomings limit the evidential value of Exhibit SP8.**

35. **Exhibit SP9** contains screenshots from what is said to be the Foursquare website. I note that the exhibited screenshots are undated, and the website address is missing. I also note that the two user comments pre-date the relevant period, 8 June 2013 and 22 February 2013. With its submissions, the applicant brings to my attention that one of the comments "*is from "Sheetal P" who appears to be the Opponent.*" Whilst I can extract from

the contents of the screenshots that these relate to the Cake Away shop, there is no presence of the earlier mark in the Exhibit. For these reasons, **Exhibit SP9 shows nothing about the position during the relevant period.**

36. Ms Patel states that **Exhibit SP10** comprises screenshots from the Trustpilot website. Although no web address is included with the screenshots, there is a list of several reviews. I note that there are 19 user reviews from 2021, post-dating the relevant period. Although there are 8 user reviews from 2020, falling within the relevant period, only 3 refer to goods such as cakes. Nevertheless, I note that the earlier mark is not shown in the said screenshots. **The shortcomings limit the evidential value of Exhibit SP10.**
37. **Exhibit SP11** is stated to be screenshots that the “brand has been in use since 2012”, demonstrating reviews that originate from the *foodhub.co.uk* website. I note that the screenshots contain reviews and ratings for ‘Cakeaway’. I have considered all the reviews and ratings, the majority of which pre- and post-date the relevant period, and, thus, I do not propose to summarise them here. I also note that 9 reviews fall within the relevant period, namely 2 from 2020, 2 from 2019, 1 from 2018, 3 from 2017, and 1 from 2016, containing comments and ratings referring to goods, such as cakes, desserts, cookies, and milkshakes. Nevertheless, I note that none of the reviews features the earlier mark. For the given reasons, **the shortcomings limit the evidential value of Exhibit SP11.**

Conclusion on evidence of genuine use

38. I have given close consideration to the evidence provided by the opponent in order to demonstrate that her use of her earlier mark, in respect of the goods and services relied upon, during the relevant period, meets the requirements for genuine use as per *Walton*, set out earlier in this decision. I note that the opponent has had the benefit of professional representation during these proceedings. I also have in mind the guidance from

the *Dosenbach-Ochsner* and *Awareness* appeal cases emphasising the need to consider what the evidence fails to “show” and what might reasonably have been conclusively shown. In my analysis throughout paragraphs 25-36 above, I have highlighted numerous shortcomings in the evidence.

39. In addition, I note that it is typical to see evidence, such as turnover figures or invoices under the mark, particularised in relation to the goods and services relied upon. Such information should have been available to the opponent, and relatively easy to provide. Despite the witness having full access to her own company records and despite having provided detailed information as to the company information and accounts, the witness evidence is vaguely expressed in important aspects, and the exhibits are of limited, if any, evidential value.

40. Further, there is no clear evidence of how the goods and services under the mark are promoted or offered for sale. That said, the opponent provided screenshots of her social media accounts and ratings/reviews from review websites with only a very small number of them falling within the relevant period. Even in that case, I note that the mark as registered does not feature in the review websites. The evidential picture as a whole is not sufficiently consistent, and what relevant evidence there is of limited value.⁴ It is my view that the evidence is not sufficiently “solid or specific to enable proper and fair evaluation of the scope of protection to which the opponent is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the [applicant], the opponent and, it should be said, the public.”⁵ Consequently, the above evidence fails to show real commercial exploitation of the mark to create and maintain a share of the UK market for the given goods and services.

⁴ See paragraphs 31, 35, and 36 of this decision.

⁵ See *Awareness Limited v Plymouth City Council*, Case BL O/230/13.

OUTCOME

41. Since I have found that the evidence filed is insufficient to establish genuine use of the earlier mark in the UK during the relevant period, the opponent is unable to rely on any part of her registration as a basis to pursue her section 5(2)(b) objection. **Consequently, the opposition fails, and the application is able to proceed to registration in its entirety.**
42. For the sake of completeness, I acknowledge that the opponent appears to have been involved with some sort of food provision – seemingly a cake shop or café – but the evidence is not clear enough to be able to determine which specific goods or services have been offered by reference to the earlier mark. However, even if, on the most generous construction of the evidence, I were to conclude that the opponent had made use of her earlier mark in relation to a cake shop/café, it is my view that the opposition would anyway have been bound to fail. This is because the marks are entirely different in their overall impressions, such that even on the hypothetical premise that the opponent were able to rely on goods that are identical to any of the applied-for goods there would be no likelihood of confusion. The visual differences between the marks could scarcely be more striking; there is a conceptual difference between 'cake away' and 'BakeAway' and other aspects in the competing marks, nor are the marks aurally identical.

COSTS

43. This opposition has failed in its entirety and the applicant is entitled to a contribution towards its costs of defending its application. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 2/2016. I award costs as follows:

Considering the other side's statement and preparing a counterstatement	£350
Considering and commenting on the other side's evidence	£600

Preparing for and filing submissions-in-lieu	£500
Total	£1,450

44. I have not made a particular award for the evidence filed by the applicant, since it appeared to be of very limited relevance.
45. I, therefore, order, Sheetal Patel to pay C  ria UK LTD the sum of  1,450. 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 2nd day of February 2023

**Dr Stylianos Alexandridis
For the Registrar,
The Comptroller General**