

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION No. 2585410 BY MR ESMAIL ADIA

AND IN THE MATTER OF OPPOSITION No. 102493 THERETO BY MR WASEEM GHIAS

DECISION

Introduction

1. This is an appeal from the decision of Mr Martin Boyle, acting for the Registrar, dated 17 April 2013 (O-157-13), in which he partially allowed and partially refused an opposition brought by Mr Waseem Ghias ('*Mr Ghias*') against UK Trade Mark Application number 2585410 by Mr Esmail Adia ('*Mr Adia*').
2. At the hearing of the appeal Mr Ghias appeared in person; and Mr Adia appeared in person assisted by Mr Mujtaba.

Background

3. Application number 2585410 was filed by Mr Adia trading as Griller King on 22 June 2011 requesting registration of the following mark:



4. The application covered the following services in Class 43:

Services for providing food and drink; temporary accommodation; restaurant, bar and catering services; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; retirement home services; creche services
5. The application was published in the Trade Marks Journal on 15 July 2011.

6. On 7 October 2011 Mr Ghias filed a Notice of Opposition together with a Statement of Grounds. The opposition was brought under Section 5(1), 5(2)(a) and 5(3) of the Trade Marks Act 1994 (*'the 1994 Act'*).
7. As set out in paragraph [2] of the Decision these grounds of opposition were in substance pleaded as follows:

Sections 5(1), 5(2)(a) & 5(2)(b) – That Mr Adia's mark is likely to be confused with two of Mr Ghias's earlier trade marks (*'the earlier marks'*) which cover goods and services in classes 29, 30, 32 and 43;

Section 5(3) – That the earlier trade marks have a reputation of which an unfair advantage is being taken, in that Mr Adia's mark will necessarily result in free riding on the advertising carried out by Mr Ghias, and on the reputation and distinctive character he has built up in the earlier marks; that the quality of the food provided by Mr Adia's business is such that use of Mr Ghias's mark would lead to an association with them likely to be damaging to Mr Ghias; and that inclusion of the word griller as a distinctive element of Mr Adia's mark would inevitably lead to erosion and dilution of the distinctive character of the earlier marks.

8. The earlier marks relied upon by Mr Ghias were:
 - (1) Trade Mark Registration No. 2326754 for



(*'the flames device mark'*) which was filed on 15 March 2003 and registered on 24 October 2003; and

- (2) Trade Mark Registration No. 2376629



(*'the chicken device mark'*) which was filed on 26 October 2004 and registered on 25 March 2005.

The relevant details for both marks are set out in Annex A to this decision. Both earlier marks relied upon were subject of the proof of use conditions set out in Section 6A of the 1994 Act the registration procedure having been completed more than 5 years prior to the filing date of the application in suit.

9. On 6 February 2012 Mr Adia filed a notice of defence and counterstatement. A minor technical amendment was filed on 23 March 2012. Mr Adia denied the grounds of opposition but did not put Mr Ghias to proof of use of the earlier marks.
10. The consequence of not putting Mr Ghias to proof of use was that the earlier marks could be relied upon to the extent of the statement of use made on behalf of Mr Ghias which covers all the goods and services specified in the earlier marks.
11. On 2 May 2012 Mr Ghias filed an amended Notice of Opposition together with a Statement of Grounds pleading further grounds under Section 3(6) and Section 5(4)(a) of the 1994 Act.
12. As set out in paragraph [4] of the Decision these grounds of opposition were in substance pleaded as follows:

Section 3(6) – That though Mr Adia has operated a fast food restaurant under Mr Adia’s mark, certain other services covered by the application are so different from these services that he cannot be regarded as having, or having had at any material time, any intent to use the mark in relation to those services.

Section 5(4)(a) – That goodwill possessed by Mr Ghias in his business and associated with the sign **GRILLER** would lead to any use of Mr Adia’s mark being liable to be prevented by virtue of the law of passing-off.
13. No amended counterstatement was filed in response. However as observed by the Hearing Officer in paragraph [4] of his Decision ‘*it is clear from the way in which the proceedings have progressed together with the arguments that have been made, that Mr Adia continues with his defence on a similar basis to the defence he has already filed.*’
14. Both sides filed evidence. Mr Ghias requested a hearing.
15. A hearing before Mr Boyle took place on 14 March 2014 at which both Mr Ghias and Mr Adia attended.

The Patents County Court Proceedings

16. The present Opposition proceedings, with which this appeal is concerned, are not the only dispute as between the parties. Mr Ghias had previously brought trade mark infringement proceedings in the Patents County Court. Those infringement proceedings were brought by Mr Ghias against a number of parties including Mr

Adia. The trade marks relied upon in those infringement proceedings were the same as the earlier registered trade marks relied upon in the Opposition. There was no claim for passing off. On 24 January 2012 the infringement claim against Mr Adia was dismissed: see the Judgment of Miss Recorder Michaels in Waseem Ghias t/as GRILLER v. Mohammed Ikram t/as THE GRILLER ORIGINAL & Others [2012] EWPC 3. On 15 March 2012 the application for permission to appeal was refused by Lord Justice Lewison.

17. Both parties referred to those proceedings in the context of the present Opposition indeed the judgment of Miss Recorder Michaels, together with the Order of Lord Justice Lewison, were exhibited to the witness statement made by Mr Adia. The Hearing Officer referred to the infringement proceedings in a number of paragraphs his Decision. At paragraph 37 the Hearing Officer said this:

In 2011 Mr Adia's mark, and the marks of other parties, including one trading under the sign "Griller Hut" were the subject of infringement proceedings brought in the Patents County Court by Mr Ghias. Both Mr Ghias and Mr Adia referred to these previous proceedings in their witness statements and at the hearing, but no claims of estoppel were pleaded. The Court's findings of fact are not binding upon me, but I have borne them in mind.

Standard of review

18. This appeal is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was clearly wrong. See Reef Trade Mark [2003] RPC 5, and BUD Trade Mark [2003] RPC 25.
19. More recently in Fine & Country Ltd v Okotoks Ltd (formerly Spicerhaart Ltd) [2013] EWCA Civ 672; [2014] FSR 11 Lord Justice Lewison said at paragraph [50]:

The Court of Appeal is not here to retry the case. Our function is to review the judgment and order of the trial judge to see if it is wrong. If the judge has applied the wrong legal test, then it is our duty to say so. But in many cases the appellant's complaint is not that the judge has misdirected himself in law, but that he has incorrectly applied the right test. In the case of many of the grounds of appeal this is the position here. Many of the points which the judge was called upon to decide were essentially value judgments, or what in the current jargon are called multi-factorial assessments. An appeal court must be especially cautious about interfering with a trial judge's decisions of this kind. . . .

20. On appeals of this nature, it is necessary to bear these principles in mind.

The Hearing Officer's Decision and the Grounds of Appeal

21. The Hearing Officer rejected the Opposition under Section 5(1), 5(2)(a), 5(2)(b), 5(3) and 5(4)(a) of the 1994 Act.

22. The Hearing Officer allowed the Opposition under Section 3(6) of the 1994 Act insofar as it related to the following services: '*temporary accommodation; provision of holiday accommodation; booking and reservations services for holiday accommodation; retirement home services; creche services.*'

23. On 14 May 2013 Mr Ghias appealed. No Respondent's Notice or Cross-Appeal was brought by Mr Adia. It was confirmed by Mr Adia, who appeared in person as he did below, at the hearing of the Appeal that his position was that the Hearing Officer's Decision should be upheld for the reasons that he gave.

24. The Hearing Officer's Decision included a review of the principles of law. On this appeal, in which Mr Ghias appeared in person, as he did below, no challenge has been made to the Hearing Officer's statement of the principles of law that he applied. It seems to me that this was the appropriate position for Mr Ghias to adopt given that in my view there is nothing wrong with the Hearing Officer's analysis of the relevant law.

25. Although the Grounds of Appeal are not conventionally structured they contend in substance that the Hearing Officer wrongly evaluated:

- (1) the evidence of use of the earlier registered marks;
- (2) the evidence of use of the sign GRILLER being the sign relied upon under Section 5(4)(a) of the 1994 Act;
- (3) the similarity of the mark applied for and the earlier marks; and
- (4) the evidence of confusion for the purposes of both Section 5(2)(b) and Section 5(4)(a) of the 1994 Act.

On that basis it is contended that the Hearing Officer erred in making the findings he did under Section 5(1), 5(2)(a), 5(2)(b), 5(3) and 5(4)(a) of the 1994 Act.

26. At various points in both the TM55 and in the course of his submissions Mr Ghias sought to expand upon the evidence filed in support of the Opposition and also invited me to consider various additional materials including material on the internet that he had available at the Hearing. As I explained to Mr Ghias at the hearing, although this is understandable from a litigant in person, none of these are matters which may be taken into account in my Decision. It was for that reason that to the extent that I was invited to look at additional materials in the course of the hearing I declined to do so.

27. Although the last paragraph of the Grounds of Appeal indicates that Mr Ghias seeks to appeal the findings under Section 5(1), 5(2)(a), 5(2)(b), 5(3) and 5(4)(a) of the 1994 Act there is no suggestion in the Grounds of Appeal that the Hearing Officer was wrong to find in paragraph [19] of his Decision that '*The differences between [Mr Adia's] mark and the earlier marks are manifestly not so insignificant that they may go unnoticed by an average consumer for the services in question*'. Moreover in my view this is clearly a correct assessment and I therefore do not consider the grounds of Opposition under Section 5(1) and Section 5(2)(a) of the 1994 Act further in this Decision.
28. There is one further additional issue raised by Mr Ghias which it is convenient to deal with at this point. It was contended by Mr Ghias that Trade Mark Registration No. 2326754 was not for the flames device mark as registered but for the sign GRILLER alone. Mr Ghias drew my attention to various pieces of correspondence from the UK IPO with regard to this application in support of his position on this issue. However it was ultimately accepted by Mr Ghias that he had applied for registration of the flames device mark and that was the mark that was advertised and ultimately registered by the UK IPO. It is the flames device mark which is one of the earlier registered trade marks that was relied upon in support of the Opposition and which the Hearing Officer correctly considered and which I must consider as part of the present appeal.

Decision

29. As explained to the parties at the hearing of the appeal for the purposes of the determination of the Opposition proceedings the assessment for conflict must be made on the basis of the trade mark applied for (not some other sign that may or may not have been used by Mr Adia) in respect of the goods and/or services specified in the application (not some other goods and/or services in respect of which Mr Adia may or may not have used the sign applied for).
30. As also explained to the parties in the course of the hearing, in that sense, the assessment for conflict in opposition proceedings is not the same as that which is made in court proceedings for trade mark infringement and/or passing off where it is the defendant's sign in the form as actually used in respect of the goods and/or services actually provided that is the subject of the assessment by the Court albeit applying the same legal principles.
31. The relevant date for the assessment of the Grounds of Opposition is the filing date which in the present case as correctly stated by the Hearing Officer was 22 June 2011. This requires the decision taker to make an assessment as of 22 June 2011 on the basis of evidence directed to the factual position as of that date and not at some later date.
32. The effect of this is that in order for evidence to be of relevance to the assessment that is to be made it must be directed to the position as at or prior to 22 June 2011.

33. The Hearing Officer summarised the evidence filed by both parties in the Opposition in paragraphs 6 to 14 of his Decision. He did so as is usual in such decisions by summarising each round of evidence (evidence in support of the Opposition filed by Mr Ghias; evidence in answer to the Opposition filed by Mr Adia; and evidence in reply filed by Mr Ghias) in chronological order.
34. In the Grounds of Appeal certain criticisms were made of the Hearing Officer's summary. I have re-read the evidence and in my view the criticisms of the Hearing Officer's summary of the evidence are not justified. In many cases they arise as a result of a misunderstanding (understandable in circumstances where Mr Ghias is acting in person) of the role of the summary of the evidence in the Decision. To the extent that the criticisms are more properly directed to the Hearing Officer's findings under Section 5(2)(b), 5(3) and 5(4)(a) of the 1994 Act they are dealt with below which I will deal with in the same order as the Hearing Officer.

Section 5(3) of the 1994 Act

35. At paragraph 18 of his Decision the Hearing Officer rejected the Opposition under Section 5(3) of the 1994 Act he did so on the basis that Mr Ghias had '*not established that at the time when [Mr Adia's] mark was applied for either of the earlier marks enjoyed a reputation for the purposes of Section 5(3) of the Act*'.
36. Mr Ghias contended that the Hearing Officer had not properly assessed the evidence of use for the purposes of establishing the relevant reputation of the earlier marks.
37. In paragraphs 16 to 18 of his Decision the Hearing Officer set out his findings of fact as follows:

16) Unfortunately, much of the evidence presented by Mr Ghias is undated. However, this lack of dating is helped by his commentary in his first witness statement where, for example, he exhibits current versions of promotional leaflets, but explains that use of the marks was similar in earlier versions. Moreover, some evidence can be clearly dated: for example, the TV advertisement including scenes shot at the opening of the Norbury franchise in April 2007. This shows use of the flames device mark and aural use of the word GRILLER – though the words “Chicken n Pizza” have been cut from the chicken device mark. I am satisfied that the totality of the evidence shows that Mr Ghias made use of “the flames mark”, in relation to at least the food related services covered by the earlier mark during the period from 2003 to the 22 June 2011 (this latter date being when the application for Mr Adia's mark was filed). Use of the chicken device mark is less clear-cut. The chicken waiter device is often used on its own. Sometimes the word GRILLER and flames device appear under it, as in the registered mark. I have not been able to find any instance of the

use of the mark exactly as registered, to include the words “Chicken n Pizza”, but this might well go unnoticed by the average consumer.

17) However, it must be established not just that the mark has been used, but that it has a reputation as defined earlier. Mr Ghias has provided no evidence of his share in what must be a vast UK market. Even if I were to accept Mr Ghias’s proposed extrapolation of his own business’s turnover figures to calculate the turnovers of his franchisees, the combined turnovers at any given point between 2003 and 2011 must represent a tiny proportion of the turnover in the UK market. Mr Ghias exhibited a table of addresses and operating periods of all the GRILLER outlets that have operated in the UK since 2003. From this it would seem that the number of outlets at any given time in London and the home counties has been relatively modest, given the population of the area; coverage outside London and the south trading, and outlets in Cardiff, Coventry and Blackburn were still trading).

18) There are problems with assessing the numbers of people reached through Mr Ghias’s advertising on Asian radio and TV channels in the UK. The absence of precise, independent evidence on readership and viewing figures make it difficult to assess the impact of Mr Ghias’s advertising. Mr Ghias states that viewing figures for the Asian radio and TV channels on which he has advertised are hard to come by, but exhibits a Weekly Total Viewing Summary from July 2012 from the website of the Broadcasters’ Audience Research Board. Unfortunately, however, the headings of the figure columns, and explanatory notes, are not shown in the print-outs. 2012 is after the material date in any event. It is therefore not possible to know with certainty exactly what the figures represent, or how they are to be interpreted in terms of the number of persons who might have viewed the relevant advertisements, and how frequently. A further problem is that such marketing is not aimed at the general public in the UK, but an ethnic subset. The distribution of leaflets, advertising in local free papers and Yellow Pages and on billboards in the vicinity of relevant outlets may be presumed to have increased local awareness of them. However, given the modest number of these outlets in the UK as a whole, it is difficult to see how the combined effect of the local advertising and advertising on Asian radio and TV could have led to the marks being known by a significant part of the UK public for the services in question. Mr Ghias has therefore not established that at the time when Mr Adia’s mark was applied for either of the earlier marks enjoyed a reputation for the purposes of section 5(3) of the Act. Accordingly, **the opposition under section 5(3) fails.**

38. I have reviewed the entirety of the evidence that was before the Hearing Officer and in particular I have reviewed the CD exhibited to Mr Ghias's first witness statement dated 25 July 2012 which contained recordings of radio and TV advertising spots. As with the summary of evidence I can detect no material error of the Hearing Officer in making his assessment of the evidence or any material error of principle in the Hearing Officer's finding that there was insufficient evidence before him to support a finding of reputation under Section 5(3) of the 1994 Act.

Section 5(2)(b)

Similarity of services

39. At paragraphs 21 and 22 of his Decision the Hearing Officer identified the best case for the purposes of the comparison between goods and services and found that *'Services for providing food and drink; temporary accommodation; restaurant, bar and catering services; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation'* in Class 43 were identical to those for which both earlier trade marks were registered.
40. Although this was a finding that was initially the subject of criticism by Mr Ghias he ultimately accepted that this was a finding in his favour. He was entirely correct to do so.
41. The Hearing Officer also went on to find in paragraph 23 of his Decision that *'Retirement home services; crèche services'* were not similar. However nothing turns on that finding on this appeal.

The comparison of the earlier marks

42. The Hearing Officer made his assessment of similarity of marks by reference to what he regarded, correctly, as Mr Ghias' best case namely the flames device mark. The Hearing Officer held that there was (1) a low degree of visual similarity between the marks (paragraph 32); (2) a moderate degree of aural similarity (paragraph 33); and a low degree of conceptual similarity (paragraph 34).
43. On appeal Mr Ghias contended that these findings did not give sufficient weight to the word GRILLER being the dominant feature of the marks the subject of the comparison the mark and failed to recognise that the word KING would be perceived as laudatory and *'will give the kind of impression of better GRILLER'*.
44. These points were taken on board by the Hearing Officer who having heard the submissions of the parties said:

30) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The visual, aural and conceptual similarities of the marks must be

assessed by reference to their overall impressions, bearing in mind their distinctive and dominant components.

31) The flames device mark consists of the word GRILLER written in a slightly stylized but simple font, with a flame design on each side. The flame device is certainly not negligible, but it is the word GRILLER which strongly dominates the mark.

32) The flames device mark is not registered with regard to colour, and I must bear in mind that notional and fair use would cover use of the mark in any colours. The colour in the applied for mark cannot act as a distinguishing feature in the comparison with the flames device mark. From a visual perspective, the flames device mark and Mr Adia's mark both contain the word GRILLER, which gives an element of visual similarity. I have explained in paragraph 27 that I consider the word GRILLER to be of weak distinctiveness. Mr Ghias contends that the word KING in Mr Adia's mark would be perceived as laudatory, leading the average consumer to place more emphasis on the word GRILLER. However, I consider that the words "GRILLER KING" produce a composite term, and will hang together in the consumer's perception. The roundel form of Mr Adia's mark, with the central prominence it gives to the letters Gk and stencil-style chicken head, contrasts with the horizontal form of the flames device mark. There is a low degree of visual similarity between the marks.

33) In oral use the flames device mark is likely to be spoken as "Griller". However, as I have explained, I think the words GRILLER KING will hang together in the consumer's perception. For this reason, if Mr Adia's mark is spoken, I consider that it will be spoken as GRILLER KING. The inclusion of the word GRILLER gives a moderate degree of aural similarity between Mr Adia's mark and the flames device mark.

34) As regards the conceptual comparison, the inclusion of the word GRILLER gives some degree of conceptual similarity between Mr Adia's mark and the flames device mark. But the inclusion of the word KING in Mr Adia's mark also adds an element of conceptual dissimilarity to the marks as a whole. Viewed overall, the degree of conceptual similarity between Mr Adia's mark and the flames device mark is low.

45. For the reasons set out in paragraphs 18 and 19 above these are exactly the type of findings with which I should not interfere on appeal being a value judgment for the Hearing Officer which he was entitled to make. I have detected no material error of principle in the Hearing Officer's assessment of similarity.

Likelihood of confusion

46. There is no suggestion that the Hearing Officer did not apply the correct law to his assessment of the likelihood of confusion or that he did not take into account Mr Ghias' submissions on the basis of Case C-120/04 Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH.
47. The main thrust of the complaint on appeal was the treatment of the Hearing Officer of the evidence of confusion put forward on the part of Mr Ghias. In particular it is said that the findings of [65] to [67] of the Judgment of Miss Recorder Michaels in Waseem Ghias t/as GRILLER v. Mohammed Ikram t/as THE GRILLER ORIGINAL & Othrs [2012] EWPC 3 were made in the context of different proceedings and not relevant to the decision that the Hearing Officer needed to make.
48. The Hearing Officer's assessment of the evidence of confusion filed in the Opposition proceedings were set out in paragraphs 38 to 40 of his Decision as follows:

38) In the present proceedings a letter dated 9 December 2009 from his Norbury franchisee, Mr Gohar Akthar, is exhibited by Mr Ghias. It refers to Mr Akthar having raised his concern about "new Griller outlet opening in Croydon" and been assured by Mr Ghias that it was not a franchisee. He states that he attaches "some letters of complaints from our existing customers who have visited to Griller King and Griller Hut, assuming this is one of Griller franchise's outlets". Mr Ghias exhibits two letters which were considered by the recorder in the previous Patents County Court infringement proceedings. Her assessment of them was as follows:

65. There was little evidence of confusion before the Court in respect of 'Griller King' even though the restaurant opened in about August 2009. The Claimant was alerted to its opening at the end of July 2009, by his Norbury franchisee, Mr Akhtar. The Claimant exhibited two letters from customers. First, there was a letter dated 8 September 2009 sent to 'Griller Norbury Head Office' at the Norbury address, from a Mr Hassan, who said he was a regular customer of the Norbury restaurant. He mentioned having visited the 'Griller King' restaurant, as well as the 'Griller Hut' restaurant, "as it seems that they were part of the same franchise." He said that on going to 'Griller King' the menu and food type looked different; he thought the food was of an inferior taste. He said that one of the workers at the restaurant told him that 'Griller King' was part of the 'Griller' franchise chain. At the end of his letter he asked whether 'Griller King' and 'Griller Hut' are part of the 'Griller' chain, and if so why is the taste of their food so

different and inferior? Secondly there was a letter dated 10 October 2009 sent to the Claimant's restaurant address by a Mr Iqbal, who described himself as a regular customer of the Griller franchise at Norbury. He explained that when in the Croydon area he saw 'Griller King' and went in there assuming that it is the same 'Griller' that he knew. He was surprised that his usual meal was cheaper than the Norbury branch and said that he was told that this was a special promotional rate for a new Griller branch. He thought that the food was of inferior quality and asked for an explanation of the variation of food taste and price. Letters from Mr Akhtar, the franchisee, were also exhibited by the Claimant; although he alleged that there had been damaging confusion, he provided no direct evidence of confusion but referred to letters of complaint which I take to be those described above. No [*sic*] any instances of alleged actual confusion were pleaded.

66. The letter from Mr Hassan to my mind suggests that he was not confused by the use of the name 'Griller King' into thinking that the restaurant was connected with the Norbury restaurant he knew. Apparently he felt it necessary to ask a member of staff at the Second Defendant's restaurant whether the restaurants were connected and repeated that question in the letter of 8 September 2009. The letter from Mr Iqbal, on the other hand, suggests that there may at least have been initial interest confusion on his part, if he went into the 'Griller King' in the belief that it was the same Griller restaurant with which he was familiar. Such confusion may be actionable (see *Och- Ziff*, above at §101).

67. However, the letters alone in my view carry little weight, not just because they are not confirmed by a statement of truth but because one cannot tell clearly whether, to what extent and in what way the gentlemen concerned may have been confused, nor do I know the circumstances in which the letters were written. Although the 'Griller King' business has been open since about August 2009, no further evidence of confusion was put before me. Even allowing for the acknowledged difficulty of obtaining such evidence, the fact that there may have been a single instance of confusion in October 2009, but there is no evidence of any confusion since then suggests to me that there is no likelihood of confusion.

I respectfully agree with the recorder's assessment of the letters of Mr Hassan and Mr Iqbal. No dates are given for the letters

from Mr Akhtar considered by the judge, but I consider her comments apply to his letter of 9 December 2009.

39) For the purposes of the present proceedings, Mr Ghias has submitted further evidence of what he considers to be evidence of confusion both provided via the Norbury franchisee, who provides two further letters of complaint. According to these letters both writers assumed the Griller King restaurant to be a “branch” of Mr Ghias’s Griller network. However, there is no further information as to the circumstances of their visits or – crucially – exactly what it was that led them to make that assumption. Furthermore, these are just two letters.

40) There is also the “verbal complaints petition” sent to Mr Ghias by his Norbury franchisee, consisting of 21 names, addresses and undated signatures. The manner in which it was compiled is not clear, and the wording subscribed to by the signatories is highly leading, informing them that Mr Adia’s outlet is a franchisee of Mr Ghias’s Griller franchise chain. This is therefore not evidence of confusion. I do not consider that significant weight should be accorded to this evidence.

49. It is clear from paragraph 37 of his Decision, noted in paragraph 17 above, that the Hearing Officer was fully aware that he was not bound by the findings of the Court. That is not to say that he was not entitled to agree with the assessments made by Miss Recorder Michaels having considered the same evidence for himself as is reflected in the penultimate sentence of paragraph 38 of his Decision.
50. The Hearing Officer then went on to consider separately the materials that had not been before the Patents County Court in the context of the infringement action: see the last sentence of paragraph 38 and paragraphs 39 and 40.
51. Having reviewed the evidence I can detect no material error in the Hearing Officer’s assessments. The findings he went on to make on the basis of the evidence before him seem to me to be justified.
52. The Hearing Officer’s conclusions on the likelihood of confusion were set out in paragraph 41 of his Decision as follows:

41) I have found some of the services specified in the application to be identical to the services covered by the earlier mark, while others have no similarity. I have found that the flames device mark has a low to moderate degree of distinctiveness, and that it is the word GRILLER which dominates the mark. I have found low degrees of visual, and conceptual similarity, and a moderate degree of aural similarity between Mr Adia’s mark and the earlier mark. Bearing all this in mind, together with my assessment of the nature of the average consumer and their purchasing process, allowing for

the principle of imperfect recollection, and having regard to the interdependency principle, I do not consider that there is a likelihood that the average consumer will directly confuse Mr Adia's mark with the earlier mark, since the differences are plain to see. I must also consider the likelihood of the marks causing indirect confusion, in other words, and applied to this case, whether the commonality of the word GRILLER in both marks will likely cause the average consumer to believe that the relevant services provided under the respective marks are the responsibility of the same or an economically linked undertaking; in my view s/he will simply consider that two different firms have made use of a highly allusive word in the context of different marks. **Accordingly, the opposition under section 5(2)(b) of the Act fails.**

52. Again, for the reasons set out in paragraphs 18 and 19 above, these are exactly the type of findings with which I should not interfere on appeal being a value judgment for the Hearing Officer which he was entitled to make. It seems to me that they were findings that were entirely justified on the evidence before him. In the circumstances the challenge to the Hearing Officer's finding must fail and I uphold the Hearing Officer's assessment of no likelihood of confusion.

Section 5(4)(a) of the 1994 Act

53. The Grounds of Appeal in relation to the finding by the Hearing Officer under Section 5(4)(a) of the 1994 Act related in large measure to the Hearing Officer's assessment of the evidence of confusion relied upon by Mr Ghias.
54. The Hearing Officer's conclusion under Section 5(4)(a) were set out in paragraph 45 of his Decision as follows:

45) I have already explained in paragraphs 37 to 41 why I have not found Mr Ghias's evidence of actual confusion persuasive. I have already compared Mr Adia's mark with the flame device mark, and found no likelihood of confusion. In doing so, I found that though the flames device was not negligible, the dominant element of the mark was the word GRILLER, yet I found no likelihood of confusion. Mr Ghias considers his position to be better here because his goodwill is associated with the word GRILLER per se. I bear this in mind, but I still consider the same reasoning is applicable here. I do not consider that a substantial number of Mr Ghias's customers or potential customers, would be misled by the use of Mr Adia's mark into thinking that his services were those of Mr Ghias and his franchise network. In any event, even though GRILLER per se is used on menus and aurally in advertising, the primary sign is still the flame device, as this is the sign on the shop-front and this still forms part of the fabric of the goodwill. Accordingly, the opposition under section 5(4)(a) of the Act fails.

55. As stated above there was no suggestion that the Hearing Officer did not identify the correct legal test under Section 5(4)(a) of the 1994 Act. In such circumstances it is important to observe the distinction (as set out in paragraphs 18 and 19 above) between on the one hand making a decision at first instance and on the other hand determining on appeal whether it was open for the decision taker at first instance to arrive at the decision he did on a correct application of the law to the matter in dispute.
56. To the extent that the Hearing Officer's findings in relation to the evidence of confusion have been criticised I have taken the view that for the reasons set out above that they are unjustified.
57. It seems to me that when making the findings that he did under Section 5(4)(a) of the 1994 Act the Hearing Officer addressed himself to the assessment that he was required to make from the correct legal perspective. He did not, when forming his view, take immaterial factors into account or disregard any material factors. I do not consider that on balancing the factors the Hearing Officer identified in the way he did, he came to a conclusion that was not open to him.

Conclusion

58. For the reasons set out above it does not seem to me that there is any error of principle or material error in the Hearing Officer's decision. In the result the appeal fails.
59. Neither side has asked for any special order as to costs. Since Mr Ghias has been unsuccessful on this appeal, Mr Adia is entitled to his costs. In making my award I have taken into account that both parties to this Appeal were unrepresented. I order that Mr Ghia pay a contribution towards Mr Adia's costs of £150, to be paid within 14 days of the date of this Decision, together with the £500 costs awarded by the Hearing Officer below.

Emma Himsworth Q.C.

29 September 2014

Mr Adia appeared in person

Mr Ghias appeared in person

The Registrar was not represented at the hearing and took no part in the Appeal

ANNEX A

Mark	Relevant Dates	Specification
<p>UK Trade Mark Number 2326754</p>  <p>‘the flames device mark’</p>	<p>Filing Date: 15 March 2003</p> <p>Registration Date: 24 October 2003</p>	<p>Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats.</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.</p> <p>Class 32: Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.</p> <p>Class 43: Restaurant, bar and catering services; provision of holiday accommodation; booking/reservation services for restaurants and holiday accommodation, services for providing food and drink; temporary accommodation.</p>
<p>Registered Trade Mark number: 2376629</p>  <p>‘the chicken device mark’</p>	<p>Filing Date: 26 October 2004</p> <p>Registration Date: 25 March 2005</p>	<p>Class 29: Meat, fish, poultry and game, meat extracts; preserved, dried and cooked fruits and vegetables, jellies, jams, fruit sauces, eggs, milk and milk products, edible oils and fats.</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,</p>

		<p>salt, mustard, vinegar, sauces (condiments), spices, ice.</p> <p>Class 32: Beers, minerals and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices, syrups and other preparations for making beverages.</p> <p>Class 43: Restaurant, bar and catering services, provision of holiday accommodation, booking/reservation services for restaurants and holiday accommodation, services for providing food and drink, temporary accommodation.</p>
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