



Neutral Citation Number: [2025] EWHC 561 (Ch)

Case No: CH-2024-000106

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY
ON APPEAL FROM THE INTELLECTUAL PROPERTY OFFICE

Date: 12 March 2025

Before :

IAIN PURVIS KC

SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

Between :

NISSIN FOODS HOLDINGS CO., LIMITED

Appellant

- and -

MOMOIP LLC

Respondent

Michael Edenborough KC, instructed by Dehns, for the Appellant
Jamie Muir Wood, instructed by Stevens and Bolton LLP, for the Respondent

Hearing date: 4 December 2024

JUDGMENT

1. This appeal raises a single issue which is accepted by both sides to be entirely determinative of the dispute between them. However, the context in which the issue arises is procedurally complex.
2. Formally this is an appeal from the decision of Ms Stephanie Wilson, sitting as a Hearing Officer in the UK Intellectual Property Office, acting for the Registrar of Trade Marks (the “Hearing Officer”), dated 26 March 2024 (the “Decision”) in which she dismissed three actions brought by Nissin Foods Holding Co., Ltd (“Nissin” or the “Appellant”): Opposition 433 532, an application for revocation for non-use 504 798, and an application for a declaration of invalidity 504 852. In the same decision she partially allowed Opposition 436 363, an application for a declaration of invalidity 505 412, and an application for a declaration of invalidity 505 452 brought by MomoIP LLC (“MomoIP” or the “Respondent”).
3. The Hearing Officer further ordered that Nissin pay MomoIP the sum of £4,300 as a contribution towards its costs.
4. The parties are agreed that the only question which arises on this Appeal is whether the Hearing Officer was wrong to find that MomoIP’s Mark 906 646 558 (the original registration of the six registrations which are the subject of the proceedings between the parties) had been put to genuine use within the United Kingdom at the relevant date. The results of all six actions now stand or fall on the result of this single point on this Appeal. However, I should summarise the various marks.
5. The marks in issue between the parties are all based on the word MOMOFUKU.

6. They are as follows (in order of seniority):
- (a) MomoIP's UK Trade Mark Registration UK 00 906 646 558 for the word 'MOMOFUKU' registered for '*restaurant services*' in class 43, filed on 6 February 2008, with a date of entry on the register of 21 January 2009 ("UK '558").
 - (b) Nissin's UK Designation of International (Madrid Protocol) Trade Mark Registration 1 418 091 for the word 'MOMOFUKU' for goods in classes 29 and 30, filed 16 January 2018, claiming Paris Convention priority to 26 October 2017 and having a date of protection in the UK of 31 January 2019 ("IR '091").
 - (c) Nissin's UK Trade Mark Registration 801 418 091 for the word 'MOMOFUKU' for goods in classes 29 and 30, filed on 16 January 2018, claiming Paris Convention priority to 26 October 2017 and with a date of entry on the register of 18 January 2019 ("UK '091").
 - (d) MomoIP's UK Trade Mark Registration 3 575 445 for 'MOMOFUKU NOODLE BAR' for services in class 43, filed 6 January 2021, claiming Paris Convention priority to 9 July 2020 and with a date of entry on the register of 9 July 2021 ("UK '445").
 - (e) MomoIP's UK Designation of International (Madrid Protocol) Trade Mark Registration 1 624 171 for a figurative version of momofuku for services in class 43, filed 22 September 2021 ("IR '171").
 - (f) Nissin's UK Trade Mark Application 3 781 000 MOMOFUKU for goods in classes 29 and 30 (the goods differing from those specified in Nissin's IR '091 and UK '091), filed 25 April 2022 ("UK '000").

7. Nissin's case is that MomoIP's mark UK '558 MOMOFUKU for restaurant-related services ought to be revoked for non-use. The relevant period for assessing use in the present case (as found by the Hearing Officer, but which was common ground before me) is the 5-year period 21 April 2017 to 20 April 2022 (3 months before the date of the application to revoke). If there was no use in that period, then the mark should be revoked from at least 21 April 2017 (or perhaps earlier) and then of course it could not act as an earlier mark to invalidate Nissin's IR '091 and UK '091. Those marks in turn are being deployed to invalidate MomoIP's UK '445 and to prevent the registration of MomoIP's IR '171. The three MomoIP marks are being used to prevent the registration of Nissin's UK '000 application. On MomoIP's side it is accepted that the revocation of UK '558 will mean that Nissin's IR '091 and UK '091 are valid and therefore that MomoIP's other marks UK '445 and IR '171 are invalid (or unregistrable), thus meaning that Nissin's UK '000 can proceed to grant. On Nissin's side the reverse is the case. It is accepted that if MomoIP's UK '558 registration is allowed to stand, then their '091 marks are invalid and their '000 MARK cannot proceed to grant.
8. This Appeal is the upshot of six actions which were consolidated for hearing by the Hearing Officer. At that stage some matters other than non-use of '558 in the relevant period were in issue between the parties (in particular some disputes about the similarity or dissimilarity of the goods or services for which the various marks were registered). However, as I have indicated, all such issues have now fallen away by agreement, leaving only the question of non-use. Essentially the parties have agreed that there is a risk of confusion between the respective goods and services for which the two families of marks are registered

and that the right to trade mark protection therefore depends on the question of whether MomoIP can claim it as the owner of the senior mark, or whether it has lost that protection by non-use. In the circumstances I do not propose to complicate this Judgment further by summarising the various actions. Any Order which is necessary following this Judgment will no doubt have to deal with them individually.

9. I turn to the issue of non-use in the United Kingdom of the mark MOMOFUKU for restaurant services in the period 21 April 2017 to 20 April 2022.
10. The parties were not in dispute about the law to be applied and both parties accepted that the general principles had been properly set out by the Hearing Officer between paragraphs 16 and 18 of her Decision as follows:

‘16. Section 100 of the Act is relevant, which reads:

“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.”

17. In easyGroup Ltd v Nuclei Ltd & Ors [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 Ansul BV v Ajax Brandbeveiliging BV [2003] ECR I-2439, Case C-259/02 La Mer Technology Inc v Laboratories Goemar SA [2004] ECR I-1159, Case C-416/04 P Sunrider Corp v Office for Harmonisation in the Internal

Market (Trade Marks and Designs) [2006] ECR I-4237, Case C-442/07 Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky' [2008] ECR I-9223, Case C-495/07 Silberquelle GmbH v Maselli-Strickmode GmbH [2009] ECR I-2759, Case C-149/11 Leno Marken BV v Hagelkruis Beheer BV [EU:C:2012:816], Case C-609/11 Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG [EU:C:2013:592], 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], Case C-689/15 W.F.Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 Ferrari SpA v DU [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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]; Centrotherm at [71]; Leno at [29]; Ferrari at [32].

(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]; Centrotherm at [71]; Leno at [29]; Gözze at [37], [40]; Ferrari at [32].

(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]. 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].

(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]; Centrotherm at [72]-[76]; Reber at [29], [32]-[34]; Leno at [29]-[30], [56]; Ferrari at [33].

(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]; 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. Proven use of a mark which fails to establish that “the commercial exploitation of the mark 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.

11. As Mr Edenborough KC, for the Appellant (Nissin), pointed out, there is of course also the question of territoriality. The relevant use must take place in the

jurisdiction of the United Kingdom. That was implicit in the Hearing Officer's Decision. There was no dispute that MomoIP had used the '558 Mark outside the United Kingdom in particular as the name of restaurants in New York (including MOMOFUKU Noodle Bar), Australia and Canada. These had received some international acclaim, and the founder of the restaurants, David Chang had some celebrity. The question however was whether any of the activities associated with the restaurant which had in some way involved the United Kingdom were sufficient to comprise genuine use here in relation to restaurant services. The Appellant's case was that no activities had taken place in the UK under or by reference to the mark, or at least they were too trivial or otherwise did not meet the *'justified in the economic sector concerned to maintain or create a share in the market'* test.

12. In coming to her conclusions in relation to the genuineness of use, the Hearing Officer was doing two things. She was making some findings of fact (what was done, where, by whom, and on what scale) and she was making an evaluative decision based on those findings (is this enough to satisfy the statutory test as it has been interpreted by the Court of Justice and the Court of Appeal of the United Kingdom). It is well-established that an Appellate Tribunal ought not to reverse a finding of fact made unless it is shown to be clearly wrong on the evidence. It is equally well-established that an experienced, specialist tribunal such as the Hearing Officers of the Trade Marks Registry are entitled to a great deal of latitude in making evaluative decisions on matters within their usual remit (which would include questions of non-use). Nonetheless, if the decision is shown to have been based on a material error of fact or law, or was one which in the view of the Appellate tribunal no reasonable tribunal could have reached,

it may still be overturned. The kind of error which will justify overturning such a decision will include the kinds identified in Re Sprintroom [2019] EWCA 932 as ‘a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion’.

13. In paragraph 22 of her Decision, the Hearing Officer made a series of factual findings to which she later referred as the basis for her ultimate decision:

‘22. With that in mind, I note the following in relation to Momo’s use of the 558 Mark in the UK and EU:

a. Mr Chang released a cookbook called MOMOFUKU in 2010. I do not have confirmation as to how many of these books were sold in the UK, but the evidence shows that as of the date of Mr Healey’s statement over 2,600 copies had been sold via Amazon.co.uk. Ms Mariscal has provided a printout of this page which shows 13 reviews dated between 17 April 2010 and 13 August 2021.

b. Momo operates a website at momofuku.com. 1.5% of all traffic to that website came from the UK, which amounts to approximately 900 visits per month in January 2012, 1,875 in January 2016 and 2,800 in January 2020. Mr Healey gives evidence that by 2022 a further 1,000 visits came from users in Germany, although that is not apparent to me from the evidence filed, nor do I have any detail of how many visitors came from other EU countries during any earlier periods.

c. An alternative report provided suggests that web traffic from the UK was actually closer to 2,500 in January 2016 and closer to 5,000 in January 2020. This same report provides information about the “intent” of keyword searches,

with 9.3% (or 55 users) of searches having a “commercial” intent and 11.6% (or 719 users) having a “transactional” intent. However, it is not clear to me what is meant by these terms, and no explanation has been provided in Mr Healey’s narrative evidence.

d. Two reviews have been provided from UK customers dated August 2017 and June 2015 which relate to one of the MOMOFUKU restaurants located in New York City.

e. Momo ran a 2-day MOMOFUKU pop-up restaurant in Shoreditch in London from 24 April 2018 to 25 April 2018. The restaurant in which the pop-up took place accommodates 48 covers, and both nights were sold out within minutes of tickets going on sale, meaning 96 customers were served. A press release was issued via the host restaurant’s website by Momo on 29 March 2018 to promote the pop-up.

f. Examples of UK-based customers who have obtained goods (such as condiments and noodles) sold by Momo have been provided, with many making enquiries as to whether Momo ships its products directly to the UK. There is some evidence that Momo’s products are available to purchase from third party retailers in the UK, but no information is provided about when this arrangement began.

g. David Chang did a one-off two-day event in London on 22 to 23 June 2012. It is not clear how the event was marketed by Momo, but all of the press coverage refers to David Chang by reference to the MOMOFUKU brand. I consider it reasonable to infer that this is because Momo was itself marketing

it as a 'MOMOFUKU' event. No information is provided about the number of customers that attended this event.

h. A MOMOFUKU pop-event was held at a London-based restaurant on 29 July 2015. No information is provided about the number of customers that attended this event.

i. MOMOFUKU partnered with Nike in 2017 to create a special edition trainer, which were still available to purchase from UK-based websites as of the date of Ms Mariscal's statement. No information is provided about how many of these were sold in the UK.

j. The UK is the 4th largest customer base for MOMOFUKU's restaurants. Ms Mariscal confirms that over 95% of UK-based customers make a reservation online, prior to visiting the MOMOFUKU restaurants.

k. MOMOFUKU has almost 8,000 UK/EU customers on its email distribution list.

l. MOMOFUKU's main Instagram account had over 600,000 followers as of the date of Ms Mariscal's statement, of which over 25,000 were from the UK, within the jurisdiction.

14. I will return to the details of some of those findings later. The Hearing Officer then referred to the Judgment of the General Court in Standard International Management LLC v EUIPO, T-768/20, not a binding authority (it was decided after the transition period) but a persuasive one. In that case, the question of non-use concerned hotel services. The evidence was that the services covered

by the mark (ie the hotels) were in the United States. However there was a lot of evidence of use of the mark in the European Union in the form of

advertisements, promotional campaigns aimed at customers located in the European Union, reservations made directly by customers and through travel agencies situated in the European Union, invoices addressed to customers resident in the European Union, a bookings portal accessible to European Union customers via the applicant's website, figures issued by Google Analytics software concerning traffic on the applicant's website, as well as printouts from such a website referring to various hotel services and equipment offered and used by customers, particularly in the European Union, or even articles focusing on awards and on prizes received.

[see the Decision of the General Court at [10]].

15. The Board of Appeal of EUIPO had excluded this evidence of use on the basis that the services themselves were being provided outside the European Union. The General Court rejected this approach and annulled the decision of the Board of Appeal as being vitiated by an error of law. The reasoning of the General Court is set out between paras [36] and [39] as follows:

36 Secondly, indeed as the Board of Appeal noted in the contested decision, it follows from the case-law that, since the concept of genuine use in the European Union involves use of the mark in the European Union, the use of that mark in third States cannot be taken into account for the purposes of establishing genuine use of that mark (judgment of 19 December 2012, Leno Merken, C-149/11, EU:C:2012:816, paragraph 38).

37 *However, it cannot be inferred from that case-law that, given the fact that the services at issue are provided outside the relevant territory of the European Union, the acts of use of the contested mark seeking to promote and to offer for sale such services are necessarily taking place outside that territory.*

38 *As is apparent from the case-law referred to in paragraph 31 above, it is sufficient to state that there is genuine use of a trade mark where that mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods and services for which it has been registered, in order to create or preserve an outlet for those goods or services. Even if the applicant were to supply goods or services outside the European Union, it is conceivable that the applicant would make use of that mark in order to create or preserve an outlet for those goods and services in the European Union.*

16. Following that approach (which was agreed by the parties to this appeal to be correct) the Hearing Officer considered that the evidence before her was sufficient to establish genuine use of the mark in the United Kingdom to create or preserve an outlet for the services even though the services themselves would be provided in the United States (and one or two other countries).

17. Her reasoning in this respect was set out in paragraphs [24] to [26] which I shall set out in full:

'24. It seems to me that some similarities can be drawn with the present case. I accept that the services in issue are not hotel services (which are more easily aligned with the idea of customers in a different country booking the services

and travelling out of the jurisdiction before they are received). However, the evidence clearly shows that Momo's restaurants are 'destination' restaurants. They are highly acclaimed and are likely to be places to which customers would be prepared to travel. There is evidence of Momo promoting its restaurants through issuing its cookbook in the UK which makes direct reference to the restaurant brand MOMOFUKU and through engaging in promotional campaigns such as the one undertaken in collaboration with Nike.

25. The pop-up restaurants themselves were, in addition to being an offering of restaurant services per se, a promotional activity for the bricks and mortar restaurants operated by Momo overseas. The effectiveness of these promotional activities and the fact that they are directed at UK customers is evident from the fact that the UK is the 4th largest customer base for the MOMOFUKU restaurants and Momo has over 25,000 UK-based followers on Instagram (albeit this is only accurate as of the date of Ms Mariscal's statement, which is after the end of the relevant period). This is further supported by the fact that Momo has over 8,000 EU/UK-based customers on its email distribution list, which is a figure that is likely to have built up over a lengthy period of time. I accept, as Mr Edenborough submitted, that I do not have evidence before me of the type of emails sent to this distribution list. However, as suggested by Mr Muir Wood, it seems a reasonable inference to draw that they would have concerned the restaurant (and brand) to which they relate.

26. Whichever of the website traffic reports referred to above is taken to be accurate, there is clearly website traffic from the UK to Momo's website. Plainly, Momo's online booking facilities are accessible to UK customers

because 95% of UK customers that attend the MOMOFUKU restaurants make online reservations in advance of their visit. I accept that it is well established that the mere fact that a website is accessible from the UK is not, of itself, sufficient to establish that a business was directing its activity to customers here. However, taking all of the evidence into account, I am satisfied that Momo has used the 558 Mark in the UK in relation to restaurant services during, at least, the relevant period than runs from 21 April 2017 to 20 April 2022....’

18. As can be seen from these passages, the Hearing Officer elided this case with the Standard International case by finding that MOMOFUKU (I infer particularly the New York restaurant) was a ‘destination’ restaurant which customers from the UK might want to visit when they went to New York. Activities in the United Kingdom involving use of the mark could therefore be for the purpose of promoting that restaurant, and this could be genuine use of the mark in the UK. Of course, this was not enough in itself to determine the case in MomoIP’s favour. They also needed to show that that the nature and level of use of the mark in the United Kingdom was sufficient to amount to genuine use: ie justified in the restaurant sector as creating or preserving an outlet for the services which would ultimately be provided in the United States.
19. This brings us to the facts on which the Hearing Officer relied to conclude that genuine use had been demonstrated in the present case.
20. At the end of [24] of the Decision she refers to two matters: the MOMOFUKU cookbook and the promotional campaigns such as the one with Nike.
21. So far as the cookbook is concerned, there is little or no attempt in the Decision to explain how this was promotional of the restaurant services in New York or

other destinations save that the cookbook (by Mr Chang) contains references to the existence and setting up of the restaurants under that name. It also appears that the Hearing Officer had misunderstood the evidence about the extent to which the cookbook had been sold in the United Kingdom. The Hearing Officer referred in [22a] to the fact that over 2,600 copies of the book had been ‘sold’ through the Amazon.co.uk website as of 2022 (which would of course indicate that number of copies being purchased by United Kingdom residents). However, this was not correct. The evidence, as Mr Muir Wood accepted on behalf of the Respondent, was that there were over 2,600 reviews of the book on Amazon.co.uk. Furthermore there was no reason to believe that these reviews were from United Kingdom residents (Amazon.co.uk displays reviews from other Amazon sites). In other words, all we really know is that the MOMOFUKU cookbook was available for purchase in the United Kingdom via Amazon.co.uk.

22. Mr Muir Wood contended that this error did not really matter and that the mere presence of the cookbook on the Amazon.co.uk website was evidence of use. I do not agree. Even if one assumed that the website must have promoted the cookbook to some extent, the connection between the book and the restaurants would only be apparent to someone who had obtained and read the book. It was therefore important to know how widely the book had been circulated in the UK (ie how many sales had occurred in the UK). It is common ground that there was no evidence of this and that the Hearing Officer had simply got the point wrong.

23. Turning to the ‘promotional campaigns’, the Hearing Officer refers to the Nike campaign as if it was merely an example of several such campaigns in the UK. There was as I understand it no evidence of any other campaigns. As to the campaign itself, the Hearing Officer summarised it in 22i. A trainer called Nike SB Dunk High MOMOFUKU was indeed issued by Nike in 2017 and was still available on the website in 2022. It did not appear to have the word MOMOFUKU on the trainer (rather it had a peach logo). There is no evidence of any promotional activity save a few listings on footwear retail websites which contain no reference to the restaurant. As the Hearing Officer says, there was no evidence that any were ever sold. It is hard to see how this evidence could be said to establish any act of use of MOMOFUKU in the United Kingdom in relation to restaurant services.
24. In [25] the Hearing Officer refers to the ‘pop-up restaurants’. These had been the subject of her commentary at [22]e, g and h. In fact it is common ground that only the Shoreditch event dealt with at [22]e could have been relevant because it is the only one of the three which took place in the relevant period. The Hearing Officer therefore seems to have erred in considering that all 3 could be taken into account. As to the details of the Shoreditch event at Lyle’s restaurant in [22]e, the Hearing Officer relies on the fact that this was a MOMOFUKU pop-up, there were 96 covers and that a press release was issued. However, there was no evidence of MOMOFUKU branding at this event, nor any particular reason to believe that this activity involving Mr Chang coming to London to cook for a couple of days as a guest chef for 96 people could be regarded as genuine promotional activity for the MOMOFUKU restaurants in New York.

25. Having identified these 3 supposed ‘promotional’ activities (cookbook, trainers, pop-ups) the Hearing Officer then considers their ‘effectiveness’. She states in [25] (as quoted above) that their effectiveness and the fact that they were targeted at UK customers was ‘demonstrated’ by the fact that

‘the UK is the 4th largest customer base for the MOMOFUKU restaurants and Momo has over 25,000 UK-based followers on Instagram (albeit this is only accurate as of the date of Ms Mariscal’s statement, which is after the end of the relevant period).’

26. She does not explain why these facts can be assumed to be caused by the ‘promotional activities’ to which she has referred. The fact that the UK is the 4th largest customer base for the MOMOFUKU restaurants could well simply reflect the sheer number of UK nationals who visit New York. As for the Instagram followers, it is equally unclear why this is caused by promotional activity in the UK. Mr Chang is apparently a very well-known chef internationally. It does not seem surprising that his restaurant would have many followers in many countries, regardless of specific promotional activity under the name MOMOFUKU carried out in the UK by MomoIP or with its consent. Without more, there would appear to be no justification for the Hearing Officer to link these facts with the very limited ‘promotional activities’ under the MOMOFUKU name in the UK which she has identified.

27. The Hearing Officer then says

‘This [ie the effectiveness of the promotional activities] is further supported by the fact that Momo has over 8,000 EU/UK-based customers on its email distribution list, which is a figure that is likely to have built up over a lengthy

period of time. I accept, as Mr Edenborough submitted, that I do not have evidence before me of the type of emails sent to this distribution list. However, as suggested by Mr Muir Wood, it seems a reasonable inference to draw that they would have concerned the restaurant (and brand) to which they relate.'

28. Again, she gives no basis for linking the 8,000 EU/UK-based people on the email distribution list to the promotional activities. It seems to me likely that these emails would be obtained from people reserving a table at the restaurant, which EU/UK visitors to New York will no doubt do regardless of promotional activity taking place in the UK.
29. Finally in [26] the Hearing Officer turns to the website for the MOMOFUKU restaurants which is accessible from the UK. She was obviously very aware of the fact that the mere presence of such a website is not evidence of use of the name in the United Kingdom, unless the 'targeting' requirements summarised Lifestyle Equities CV v Amazon UK Services Ltd [2022] EWCA Civ 552 at [44] to [55] are met. She refers in this respect to joined Cases C-585/08 and C-144/09 Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Heller, EU C:2010:740. However, at no point does she find that those requirements are satisfied. The only finding she makes is that the website is 'accessible' from the UK (necessary but not sufficient for 'targeting') and that 95% of UK customers attending MOMOFUKU make reservations in advance. It seems to me that (even if one assumes that these reservations are made from the UK) this proves nothing other than that there are people in the UK who are aware of MOMOFUKU. It does not establish use of the mark in the UK, let alone targeting of the UK by the website.

30. Overall it seems to me that the Hearing Officer's decision is vitiated by a series of errors of fact and illogical assertions not justified by the evidence before her.
31. In summary:
- (a) So far as the 3 promotional activities are concerned: (i) the Hearing Officer misunderstood the evidence relating to the Amazon listing to suggest that thousands of copies of the cookbook had been sold when there was no such evidence; (ii) the evidence of the Nike trainers should never have been relied on – it established effectively nothing; (iii) the Hearing Officer took into account three pop-ups when in fact there was only one for 2 days in Shoreditch with little or no evidence of promotion of the New York restaurant.
- (b) The Hearing Officer's attempt to link causally these promotional activities to the reputation of the MOMOFUKU restaurants amongst UK consumers was illogical and not justified by the evidence.
32. In the circumstances it seems to me that the Hearing Officer was wrong to find that the Respondent had lifted the burden of proving use of the '588 mark in the United Kingdom in the relevant period.
33. The Appeal therefore succeeds. I will invite Counsel to provide a Minute of Order reflecting my decision.