Browne Jacobson

Metro’s Runs Afowl of Morley’s Marks in the Court of Appeal

17 April 2025 Alice Elliott Foster

If you live in South London, you will have almost certainly heard of Morley’s.

The iconic fast food chain’s latest dispute with Metro, now in the Court of Appeal, provides guidance on how courts should assess trade mark confusion. It also confirms that any sub-licensing rights should be set out explicitly in licences.

Case reference: Morley's (Fast Foods) Ltd v Nanthakumar & Ors [2025] EWCA Civ 186

This fried chicken franchise brought a claim against the owner of ‘Metro’s’ fast-food restaurant (the other defendants in the case were all franchisees). The defendant originally operated under the name 'Mowleys' but consented to a rebranding in 2018. The parties had agreed that Metro's would adopt a new logo featuring a blue outline and other differentiating factors (the Metro Sign). However, the defendant deviated from the agreed logo when granting franchises to other defendants. This led Morley's to file a claim for trade mark infringement. The initial claim was heard in IPEC last year – you can read our team’s analysis for Lexis+ (with a similarly punny title) here.

There are two key 'takeaways' from the judgment on appeal.

Who is the average consumer?

The concept of the 'average consumer' plays a crucial role in the assessment of confusion under section 10(2) Trade Marks Act. It is well established that the average consumer is *“reasonably well-informed, observant, and circumspect”,* but may not “scrutinise every detail”.

The judge at first instance identified two categories of average consumer: one consisting of children, young people, students, and families with limited disposable income, and another comprising late-night or early-morning patrons, often tired or possibly intoxicated. The appellants argued that these classifications inappropriately narrowed the consumer profile and lowered their level of attentiveness. They also argued that being drunk does not align with being *"reasonably well informed, observant and circumspect."*

LJ Arnold agreed with the appellants. The likelihood of confusion should not be evaluated based on potentially intoxicated consumers. He also agreed that there was no need for a separate class of late-night consumers. He emphasised that a consumer's attentiveness does not necessarily wane later in the day, citing varying shift hours and the possibility of the same consumer visiting at different times.

Despite agreeing with these points, Arnold found that these misclassifications by the lower court did not materially affect the overall likelihood of confusion assessment. Even if the test were applied to a single group of sober consumers, the outcome would still be that Metro infringed.

Sub-licensing of rights

A pivotal issue here was whether the 2018 settlement agreement between the two companies granted Metro the right to sub-licence the rights granted to it in settlement to its franchisees.

The court held that it didn’t. LJ Arnold emphasized that trade mark law does not inherently provide for sub-licensing, unless a) it is explicitly agreed upon by the parties or b) it is *“so obvious that it goes without saying”.* One can think of very limited circumstances where

b) would apply.

This is a strict but sensible application of the principles of contractual interpretation by LJ Arnold, especially given the wording of section 28(4) of the Trade Marks Act: *"Where the licence so provides, a sub-licence may be granted by the licensee; and references in this Act to a licence or licensee include a sub-licence or sub-licensee."* Although LJ Arnold's rationale for the decision was not by reference to the TMA, instead he stated the need to safeguard trade marks (especially marks with established distinctiveness such as Morley's) against being compromised and/or diluted by later, unauthorised modifications.

So put simply, express is best and if you want a right to sub-licence, agree it.

Contact

Alice Elliott-Foster

Associate

alice.elliottfoster@brownejacobson.com

+44 (0)330 045 2211

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