

O-414-10

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION Nos. 2512162 and 2512930  
BY FOODPRO MANUFACTURING LTD TO REGISTER THE TRADE MARKS**

**RAJ SPICE**

**AND**



**IN CLASSES 29 AND 30**

**AND IN THE MATTER OF CONSOLIDATED OPPOSITIONS  
THERE TO UNDER NOS 99758 AND 99759  
BY B.E INTERNATIONAL FOODS LTD**

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and 99759 by B.E International Foods Ltd**

### BACKGROUND

1. This case concerns two applications. On 27<sup>th</sup> March 2009, Foodpro Manufacturing Ltd of Chapel Lane, Wigan, WN3 5DQ (hereafter "Foodpro") applied to register the mark, "RAJ SPICE", in Classes 29 and 30. The goods are as follows:

**Class 29**

Ready meals; chilled and frozen ready meals; chilled and frozen prepared meals consisting principally of fish, meat or vegetables; foodstuffs prepared in the form of snacks.

**Class 30:**

Ready meals; chilled and frozen ready meals; chilled and frozen prepared meals consisting principally of pasta or rice; foodstuffs prepared in the form of snacks.

2. The application was allocated the number 2512162 (hereafter "162") and was published on 21<sup>st</sup> August 2009 and on 10<sup>th</sup> November 2009 B.E. International Foods Ltd of Grafton House, Stockingswater Lane, Enfield, Middlesex EN3 7JZ (hereafter "BE") lodged an opposition against all the goods specified above.
3. On 8<sup>th</sup> April 2009 Foodpro also applied to register the mark



also in Classes 29 and 30 and for the same goods as '162. The application was allocated the number 2512930 (hereafter "930").

4. This application was published on 21<sup>st</sup> August 2009 and on 10<sup>th</sup> November 2009 BE lodged opposition against all goods specified.
5. In both oppositions, BE has opposed on the sole basis of section 5(2)(b), citing the following earlier mark:

Mark	Filing and registration dates	Goods and services relied upon under section 5(2)(b)
CTM 4302551 ("551")  RAJAH	22 <sup>nd</sup> February 2005 and 17 <sup>th</sup> February 2006	<p><b>Class 29</b></p> <p>Meat, fish, poultry and game; and foods produced therefrom; soups; meat preserves; preserved, dried, cooked, frozen and canned fruits, vegetables and/or nuts; jellies, jams; pickles; preserves; edible oils and fats; fruit sauces; prepared meals; instant meals and snack foods; relishes; herbs; sesame oil; chilli oil; coconut milk; additives for foodstuffs.</p> <p><b>Class 30:</b></p> <p>Coffee, tea, coffee substitutes; sugar, rice; tapioca; sago; flour, corn flour, rice flour and preparations made from cereals; bread, pastry, biscuits and confectionery; poppadums; naan bread; chapatis; rotis; honey; treacle; yeast; baking powder; salt; mustard; pepper; vinegar; rice vinegar; sauces; spices; seasonings; sauce</p>

		powder; flavourings; pastes for making sauces; marinades; prepared meals; instant meals and snack foods; essences for foods; egg and rice noodles; curry powder; curry pastes; chutney; fortune cookies; dips for snack foods; flavour enhancers for foods; additives for foodstuffs; monosodium glutamate.
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6. The two sets of proceedings were subsequently consolidated. Naturally then, I shall deal with the two actions in a single decision.
7. As regards the opposition against '162, BE says that RAJ SPICE and RAJAH are confusingly similar; the words RAJ and RAJAH have the same pronunciation and the same meaning as each other. The addition of the word SPICE is merely descriptive and does not add anything to the distinctiveness of the application in suit. The goods covered by the application are identical and confusingly similar to those of the earlier trade mark and as a consequence, there is a likelihood of confusion on the part of the general public. They also say that a request to withdraw the application had been ignored once the opponent's grounds of opposition had been notified to the applicant.
8. Foodpro filed a counterstatement saying that RAJAH and RAJ SPICE are not similar or confusingly similar. Visually, aurally and conceptually the marks are different. In particular, RAJAH means 'ruler', whereas RAJ SPICE has no such meaning. Moreover, the word 'SPICE' cannot be ignored in any comparison between the marks. In all the circumstances there is no likelihood of confusion. The applicants admit that they were served with a Form TM7a, being notice of threatened opposition.
9. As regards the opposition against '930, BE says the marks RAJAH and RAJ SPICE Logo are confusingly similar. The same arguments as were made in respect of the words RAJ and RAJAH are then made. But additionally, BE says that the stylisation (or decoration) of the application in suit adds nothing to the mark. Verbally, the marks are still RAJAH and RAJ SPICE, which are the most distinctive parts of the marks. Given the identity of the goods, there is a consequential likelihood of confusion on the part of the general public.
10. Foodpro filed a counterstatement against this opposition also, and in exactly the same terms as '162.

11. Neither party filed any evidence or further submissions. In accordance with established practice an offer was made by the registry for a decision to be made from the papers. However, in all such cases the parties are nonetheless free to request an oral hearing in the matter and the applicants requested to be heard. The hearing came before me on 11<sup>th</sup> November 2010 by videoconference, at which the applicants were represented by Michael Hicks of Counsel, instructed by Redd Solicitors LLP, and the opponents were also represented by Tim Ludbrook of Counsel, instructed by A A Thornton & Co. Taking account of the papers on file and the submissions made at the hearing, I give the following decision.

## DECISION

### Section 5(2)(b)

12. The opposition is founded upon Section 5(2) (b) of the Act. This reads:

“(2) A trade mark shall not be registered if because –

(a).....

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

13. The earlier trade mark in this case has a filing date of 22<sup>nd</sup> February 2005 and a registration date of 17<sup>th</sup> February 2006. It is therefore an earlier mark in accordance with section 6 of the Act. Moreover, given that its registration date is under five years prior to the date of publication of the application in suit, it is not subject to proof of use requirements under section 6A of the Act.

14. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P* (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

### ***The average consumer and nature of the purchase***

15. Both parties' products comprise generally and widely available food products. Foodpro's products are processed and formed into ready meals, being in chilled or frozen state or simply supplied off the shelf, so to speak. They also have foodstuffs in the form of snacks. The reason for the separation into two Classes, 29 and 30, is plainly to do with the different nature of the principle ingredients. In Class 29 the principle ingredients are fish, meat or vegetables. In Class 30 the principle ingredients are pasta or rice. The goods specified in both Classes will however be available from a wide variety of retail outlets, from large supermarkets through to much smaller, corner shops or even ethnic outlets or markets. The average end consumer for both parties' products will therefore be the general public.
16. For their part, BE's products are also readily available from the same outlets as Foodpro's. They have a greater range of food products, including in unprocessed form. Certain of the items may be less readily available than others, for example chilli oil, coconut milk in Class 29 and sago, chappatis, rotis, treacle, fortune cookies or monosodium glutamate in Class 30 may all not be available in the smaller, corner shop but would be more likely to be available in larger outlets. That said, such products may be accessed through specialist, ethnic outlets or even markets.
17. Nevertheless, the consumer for both parties' goods will both be drawn from the same public as that of Foodpro. I must assume then, that there is identity and commonality as far as the question as to who the respective average consumers are is concerned.
18. As far as the purchasing process is concerned, both parties' products are relatively inexpensive and everyday purchases, and therefore I agree with Mr Ludbrook that not a great degree of attention will be paid by the consumer in the purchasing process. That said, and although the level of attention paid in

the process of purchase is at the low end of the spectrum, consumers will nonetheless be nothing other than reasonably circumspect and observant in that purchase and selection process.

19. I will of course factor these observations into my overall assessment of likelihood of confusion.

### ***Comparison of marks***

20. The case law makes it clear I must undertake a full comparison, from the perspective of the average consumer, of both marks in their totalities and overall impression (see authority (k) above in para 14), taking account of all differences and similarities, and also having regard to the *distinctive and dominant elements* of the respective marks [my emphasis].

21. In passing, and by way of preface to my comparison of marks, I would observe that the legal principle to which I have referred above, is of fundamental importance. In light of the position adopted by Mr Ludbrook, I need to say something in particular about the phrase “distinctive and dominant elements” contained in the statement of law.

22. In this case, I need to state explicitly, and at the outset, that I do not regard BE’s earlier mark as, what has become known as, a ‘complex mark’ (see *Matratzen Concord GmbH v OHIM* (Case T-6/01) [2003] ETMR 31 (“*Matratzen*”), ie as having a number of potentially independent and separate ‘elements’ or ‘components’. It is a single (short) word mark, and as such I am not disposed to extract, isolate, amplify or otherwise render more ‘dominant’ any part of that word. That is, notwithstanding that the three letters, R-A-J, may be recognised by the average consumer in contexts other than on or in relation to foods. In other words, I do not regard the letters R-A-J as comprising a separate and independent element within the single word mark. They do not stand out in any way, as they may do (by way of example only) in “RAJah”, or “RAJ [ space] AH”. The inescapable fact is that BE’s mark is a single, short word mark and will be recognised as such by the average consumer. Case law recognises of course that in certain circumstances even parts of single words may be accorded more of a distinctive capacity than others, but I do not believe this is the case here and the single word must accordingly be viewed as a whole.

23. Another point about BE’s mark is that I do not accept as immutable legal principle or proposition (and neither did Mr Ludbrook), that consumers will inevitably focus upon the beginnings of words rather or more than their middles and ends. This, again, *potentially* distracts me from an assessment of the respective marks’ totalities. The correct position on this matter is stated in Case T-438/07 *Spa Monopole* (“*Spa*”) where, at para 23, the General Court say that, whilst certain case law acknowledges the importance to which the consumer attaches the first part of words, this argument cannot hold in every



case, and does not “in any event, cast doubt on the principle that the assessment of similarity of marks must take account of the overall impression created by them”. The critical point I am making here, at the risk of repeating myself, is that the guiding legal principle of viewing marks as totalities must never be undermined or lost sight of, and neither would it be correct for me to apply a doctrine of ‘word beginnings’ (as I shall call it), having inevitably more significance, without regard to the particular circumstances of the case before me. As far as BE’s mark is concerned, and this will further come out in my analysis below, it is a short word mark having a simple structure and accordingly, the consumer will be unlikely to isolate the beginning over the end (see, again by way of example only, para 24 of *Spa*).

24. As regards Foodpro’s marks, I do not argue with the position taken by Mr Ludbrook to the effect that it is a legitimate exercise with complex marks to identify, assuming they exist, what distinctive or dominant element(s) there may be. With that identification in mind, to assess ‘overall impression’ with especial regard, *if appropriate*, to any shared distinctive elements.

25. After some discussion on this point at the hearing, I would mention in particular one case to which I was referred by Mr Ludbrook which, he said, supported his position and approach in the analysis of distinctive and dominant elements, as applied to Foodpro’s marks. Para 43 of Case C-235/05P *L’Oreal SA v OHIM (“L’Oreal”)* reads as follows:

“It must therefore be held that the applicant has misconstrued the concepts which govern the determination of whether a likelihood of confusion exists, by failing to distinguish between the notion of the distinctive character of the earlier mark, which determines the protection afforded by that mark, and the notion of the distinctive character which an element of a complex mark possesses, which is concerned with its ability to dominate the overall impression created by that mark”.

26. As I understand this statement in its context, the CJEU is saying no more than that an assessment of distinctive character of the earlier mark must take place, (a) in the context of the overall assessment of likelihood of confusion (which I will do below at para 55), in order to determine the protection afforded by the earlier mark. And also, (b) where one is dealing with a complex mark (whether the applicant’s, opponent’s or both), that it is appropriate to factor in the possibility that an element(s) may be distinctive (in a trade mark sense), and by virtue of that, ‘dominate’ the overall impression of the respective complex mark.

27. As regards (b), I understand Mr Ludbrook’s position to be that the word ‘RAJ’ assumes a ‘dominant’ role in Foodpro’s (complex) marks by virtue of the fact that the second word ‘SPICE’ is at the very least, heavily allusive if not entirely descriptive of the goods, and as regards the figurative elements in the

'930 mark, these too (and even more so than the word 'SPICE') are dominated by the distinctive word 'RAJ'. Assuming Foodpro's marks can be called 'complex' in the first place ('930 certainly can), it is not hard to see how Mr Ludbrook's identification of 'dominant element' may lead him to a position where the word 'SPICE' performs, in both Foodpro's marks, some kind of 'subservient' (my word, not his) trade mark role at best.

28. This, however takes us perilously close to the trap of treating the two words 'RAJ' and 'SPICE' as, in some way, divorced from each other, and in consequence, adopting, *in effect*, a legally unsound 'dissection', being one which the average consumer would never conceive.
29. Crucially, and this is where Mr Ludbrook's submission (including in his skeleton argument) is flawed; the exercise of identifying any 'dominant' element does not occur *at the outset*, and then upon which the visual, phonetic and conceptual analysis is predicated. My approach below will tackle the visual, phonetic and conceptual assessments of the respective marks, properly as wholes. Having done this, the 'overall impression' analysis must then take account of any distinctive and dominant elements. It is not hard to see how, for complex marks, a purely forensic visual, phonetic and conceptual analysis, without an overall impression having regard to distinctive, dominant elements may give rise to a wholly artificial and contrived overall result; the trees may have been suitably identified, leaving the wood far from clear.
30. With these necessary, but admittedly lengthy, comments by way of preface out of the way, I now turn to my comparison of visual, aural and conceptual aspects of the respective marks.

### **Visual comparison.**

31. BE's mark comprises a single, five letter word, RAJAH, in normal script. As I have said, there are no spaces between the letters, no breaks in between, and no prominence is otherwise given to any letter or sequence of letters contained in that word.
32. Foodpro's '162 mark comprises two separate words in the sequence, 'RAJ' and 'SPICE'. The first word is of three letter length and the second of five letter length. The words are of equal *graphic* prominence, neither one nor the other dominating in terms of script or size. Visually, the second word, 'SPICE', is incapable of being ignored or of being, in some way, 'downplayed' or rendered less (visually) dominant. The first three letters of BE's 'RAJAH' are shared, and in that sequence, with the complete word, 'RAJ', in Foodpro's mark. Bearing in mind the similarities and dissimilarities between the respective marks, I find the respective marks share a low level of visual similarity.

33. Foodpro's device and word mark, '930, is at an even lower level of visual similarity, simply because it contains additional figurative and word elements, not present in BE's mark (again, which are incapable of being visually ignored or downplayed), being an elaborate and decorative (roughly) rectangular border and background in orange and white, capped by a floral device in red, and together with the words "AUTHENTIC INDIAN CUISINE" in smaller lettering below the words "RAJ SPICE". Bearing in mind similarities and dissimilarities, I find the respective marks to share a low level of visual similarity, and below that of the '162 mark.

### **Phonetic comparison**

34. BE's mark will be pronounced "RAA-JAR" or "RAA-JA". There can be no suggestion that the second syllable will be 'unheard' in any way, but I accept that in phonetic use some emphasis may well go upon the first syllable, the second syllable being pronounced in one of two ways, as a short 'a' sound, as in 'jam', or a longer and softer 'a' sound, as in 'jar'.

35. Foodpro's word only '162 mark will be pronounced "RAAJ SPISE" (with a long 'a' sound in 'RAJ') or possibly, and depending on regional dialect, "RAD-GE SPISE" (with a short 'a' sound in 'RAJ'). There is no reason why, or evidence to suggest, that 'SPISE' will be left unpronounced and it must therefore be included in any phonetic analysis. Taking the similarities (the first syllable of 'RAJAH' and the word 'RAJ') and dissimilarities (the second syllable of 'RAJAH' and the word SPISE) into account, I find that, phonetically, the respective marks share a low degree of similarity.

36. As far as Foodpro's '930 mark is concerned, it is highly unlikely that the words "AUTHENTIC INDIAN CUISINE" will be enunciated at all, and still less likely that goods bearing the mark will be referred to be reference to any decorative border or aspect of the border. On that basis, I make exactly the same finding as the '162 mark, namely that the respective marks share a low degree of phonetic similarity.

### **Conceptual comparison**

37. By conceptual similarity, it is meant semantic conceptual similarity. At the outset, it is noted that BE's mark 'RAJAH' has a meaning, being (historical, noun) an "Indian ruler, king or prince". Likewise, the word 'RAJ' has a meaning, being (historical, noun) "British sovereignty in India". That said, whilst I am permitted to take judicial notice of those meanings, what I am expressly not allowed to do (absent evidence) is to impute that knowledge to the average consumer (see, to that effect paras 37- 39 of appointed person Case BL O-048-08, "*Cherokee*").

38. The likely scenario in this case is that the average UK consumer may well not know the exact meanings of 'RAJ' and/or 'RAJAH'. At the same time they may not know the *exact* meanings of one or both words, they may however have some vague understanding that they relate in some way to India. There is likely to be, in all probability, *some* degree of conceptual similarity, based only though upon a shared and loose connection with India. This vague understanding or connection will not be dispersed or adjusted by the other word 'SPICE' appearing in Foodpro's marks. Indeed, it is apt to reinforce the Indian link, as being the origin of many exotic spices and foods. That said, the word 'SPICE' nonetheless imparts in both Foodpro's marks a clear point of linguistic reference; whilst the meaning of 'RAJ' may not be understood by the average consumer, the meaning of 'SPICE' undoubtedly will. The concept in the word mark, '162, will then be simple, 'RAJ SPICE' or SPICE by the name RAJ. BE's mark, in contrast, has no such recognisable point of reference.
39. As far as the word and device mark, '930, is concerned, I do not believe the decorative elements will add anything to, vary or otherwise disturb the concept which the words 'RAJ SPICE' invoke and as discussed above. The one difference I would note, as regards this mark as a totality, is that the words "AUTHENTIC INDIAN CUISINE" are clearly present, and as such, will confirm beyond any doubt that the food (and indeed, the semantic concept behind the words 'RAJ SPICE') is inevitably, Indian in origin.
40. I need to bring my assessment of conceptual similarity together to make a finding. The finding is that the level of conceptual similarity between the respective marks is very low for both Foodpro's marks. In effect, this simply admits a link to India which is present in all marks.

### **Overall similarity**

41. At this point I need to make a finding of 'overall impression' of the respective marks, having regard to any distinctive, dominant elements. This is the exercise specifically mentioned in paras 25-27 above. As I have already expressly said, I do not consider BE's mark to be a complex mark. It is a single, short word, which is not prone or susceptible to any emphasis being given to any syllable or letter sequence.
42. As far as Foodpro's marks are concerned, it is worth noting that the goods of the specifications are specifically *not* 'spice' products (though they may contain spice), but ready meals and snack foods. Thus, and I find this emphatically, it cannot be argued that the word 'SPICE' is descriptive for the goods in suit, and on that basis I should in my 'overall impression' analysis focus exclusively, or otherwise place emphasis upon the word 'RAJ' to the detriment of 'SPICE'. In this case, and at the risk of repeating myself, the

semantic concept of the Foodpro's marks is 'RAJ SPICE', or SPICE by the name RAJ.

43. Taking the visual, aural and conceptual assessments *overall*, I find the respective marks (that is, BE's mark and both Foodpro's marks separately) share a low degree of similarity. I should stress that in this finding I have also factored in the nature of the goods concerned, which are everyday foodstuffs, and therefore prone more to visual selection from a supermarket shelf, than aural or phonetic selection.

### ***Comparison of the goods***

44. In assessing the similarity of the goods, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the ECJ stated at paragraph 23 of the Judgment:

'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their end users and their method of use and whether they are in competition with each other or are complementary.'

45. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.
46. It is important to recognise that even though there is no factual evidence on similarity, I nevertheless have the statements of case, submissions and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the appointed person said in *Raleigh International trade mark* [2001] R.P.C. 11, at para 20, that such evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items (which these are), evidence may not be necessary. He also stated that the tribunal may, in an appropriate case, consider the question of similarity from the viewpoint of the notional member of the relevant purchasing public.
47. With my introductory comments out of the way, the respective goods to be compared are as follows:

Foodpro's goods	BE's goods
<p><b>Class 29</b></p> <p>Ready meals; chilled and frozen ready meals; chilled and frozen prepared meals consisting principally of fish, meat or vegetables; foodstuffs prepared in the form of snacks.</p> <p><b>Class 30:</b></p> <p>Ready meals; chilled and frozen ready meals; chilled and frozen prepared meals consisting principally of pasta or rice; foodstuffs prepared in the form of snacks.</p>	<p><b>Class 29</b></p> <p>Meat, fish, poultry and game; and foods produced therefrom; soups; meat preserves; preserved, dried, cooked, frozen and canned fruits, vegetables and/or nuts; jellies, jams; pickles; preserves; edible oils and fats; fruit sauces; prepared meals; instant meals and snack foods; relishes; herbs; sesame oil; chilli oil; coconut milk; additives for foodstuffs.</p> <p><b>Class 30:</b></p> <p>Coffee, tea, coffee substitutes; sugar, rice; tapioca; sago; flour, corn flour, rice flour and preparations made from cereals; bread, pastry, biscuits and confectionery; poppadums; naan bread; chapatis; rotis; honey; treacle; yeast; baking powder; salt; mustard; pepper; vinegar; rice vinegar; sauces; spices; seasonings; sauce powder; flavourings; pastes for making sauces; marinades; prepared meals; instant meals and snack foods; essences for foods; egg and rice noodles; curry powder; curry pastes; chutney; fortune cookies; dips for snack foods; flavour enhancers for foods; additives for foodstuffs; monosodium glutamate.</p>

## **Class 29**

48. Foodpro's ready meals (whether chilled, frozen or otherwise whatever their principal ingredients may be) are, in my opinion, identical to 'prepared meals' in BE's specification. Specifically, 'ready meals' must have the same meaning as 'prepared' meals. That is to say, in each case the manufacturer has brought a variety of foods together in processed or semi-processed, cooked or uncooked state to enable that consumer to access with the minimum of effort a complete meal.
49. Foodpro's "foodstuffs prepared in the form of snacks" are likewise, identical to "snack foods" in BE's specification. There can be no difference. A foodstuff prepared in the form of a snack is, by definition, a snack food.

## **Class 30**

50. The same rationale and finding applies also in Class 30. BE has the terms "prepared meals; instant meals and snack foods" in their specification, and these encompass the terms used by Foodpro in their Class 30 specification, which mirror the terms used in their Class 29 specification.
- 51. In conclusion, the respective goods covered by both parties' specifications are identical, and I do not understand Mr Hicks to dispute that finding.**

## **Likelihood of confusion**

52. Before proceeding to bring all my findings together in an overall global assessment, I need to make an assessment of the distinctive character of the earlier mark (see point (a) of para 26 above). An invented word having no derivation from known words is, in its inherent characteristics, very high on the scale of distinctiveness, KODAK of course being the prime example. RAJAH, being a word with a meaning, is not quite on that level, but it is undoubtedly high. I therefore find that RAJAH is inherently distinctive to a high degree and this needs to be a factor when considering the protection afforded to that mark.
53. At this point I need to remind myself of my various findings and bring them together in a global assessment taking, of course, into account, the doctrine of imperfect recollection. I have found that the respective goods are identical. I have found the earlier mark to be inherently distinctive to a high degree. I have made observations on the respective average consumers, namely that they have identity and commonality and I have found the purchasing process to involve a level of attention at the low end of the spectrum. Finally, I have found the respective marks to share a low degree of similarity. Needless to say that in making a global assessment, it is not a 'tick box' exercise, whereby

if I find more factors in Mr Ludbrook's favour, he wins. All factors must be weighed in the evaluation of likelihood of confusion.

54. In all the circumstances, I find there is no likelihood of confusion in this case and the oppositions fail in their entirety.
55. I may just mention at this point that Mr Hicks did address me on the notion of 'indirect' confusion, as explained helpfully in a recent case of the appointed person, *L A Sugar*, BL O-375-10. I should just state that I do not believe 'direct' confusion will occur in this case, ie, that without any reasoning process on the part of the consumer the marks will be mistaken for each other. Nor do I believe either, that 'indirect' confusion will occur, ie that after some reasoning process, in particular involving a 'common element' or 'commonality', the consumer concludes that the later mark is another brand of the owner of the earlier mark. For reasons I have already stated at length I have concluded that the respective marks share only a low degree of similarity and there is, in fact, no common 'element' at all, and insofar as any 'commonality' (as distinct from 'common element') can be said to be present, it is at a very low level.

### **Costs**

56. Foodpro Manufacturing Ltd has been totally successful in defending against the oppositions. Accordingly, it is entitled to a contribution towards its costs and neither party sought costs off the normal scale. In the circumstances I award Foodpro the sum of £1100 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

1. Preparing counterstatements and considering statements - £400
2. Preparing for and attending a hearing - £700

Total £1100

57. I order B.E International Foods Ltd to pay Foodpro Manufacturing Ltd the sum of £1100. The sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 2 Day of December 2010**

**Edward Smith  
For the Registrar,  
the Comptroller-General**