

O-399-13
TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2583079
BY
KENNETH GREENE
TO REGISTER THE TRADE MARK



IN CLASSES 29 AND 30
AND
THE OPPOSITION THERETO
UNDER NO 102846
BY
OMAR KASSEM ALESAYI MARKETING CO LTD

BACKGROUND

1. On 31 May 2011, Green Farm Foods Limited applied to register the above trade mark in classes 29 and 30 of the Nice Classification system¹. Following subsequent rectification (on 22 May 2012) and amendment (12 November 2012) the application stands in the name of Kenneth Greene (hereafter, the applicant) for the following goods:

Class 29

Cooked sliced meats excluding venison; natural torn chicken; turkey; ham; roast beef; roast pork; cooked snack products made from chicken, turkey, ham, beef and pork but excluding venison; prepared snack foods.

Class 30

Flavourings made from meat excluding venison; meat pies excluding venison; poultry and game meat pies.

2. Following publication of the application, on 7 October 2011, Omar Kassem Alesayi Marketing Co Ltd (the opponent) filed notice of opposition against the application.

3. The grounds of opposition were brought under section 5(2)(b) of the Trade Marks Act 1994 (the Act). The opponent relies upon the mark and goods shown below:

Mark details and relevant dates	Goods relied on
<p>TM 2571528</p> <p>Mark:</p>  <p>Filed: 8 February 2011</p> <p>Registered: 12 August 2011</p>	<p>Class 29: Meat, fish, poultry and game; meat extracts; tuna meat of all types; preserved, dried canned and cooked fruits and vegetables and beans; meat and chicken gravies; jams, jelly; milk and other dairy products; concentrated and sweetened milk and powder milk; creams; chips of all types; snacks; corn flakes and crisps; eggs; yoghurt (dairy products); edible oils and fats; preserves and pickles, in class 29.</p> <p>Class 30: coffee and tea, cocoa, sugar, rice of all types; tapioca, sago, coffee substitutes, flour and preparations made from cereals, bread, biscuits, chocolates of all kinds stuffed with dried fruits; noodles; pasta; cakes, pastry and confectionery, pastes, ices, honey, treacle, yeast, baking powder, salt, mustard, pepper, vinegar, sauces, ketchup sauces; tomato pastes; spices and condiments, ice, nuts; fresh pastries; popcorns; snack foods; potato chips.</p> <p>Class 31: Agricultural-horticultural and forestry products and grains (not included in other classes), living animals, fresh fruits and vegetables and beans, seeds, live plants and flowers, foodstuffs for animals, malt; feeds; fattening feeds; coconuts fruits; fruits of pistachio; shrubs; natural fruits trees.</p> <p>Class 32: Non-alcoholic mineral and aerated waters and other non-alcoholic drinks, non-alcoholic beers; non-alcoholic black beers; syrups and other preparations for making non-alcoholic beverages; juices and refreshments.</p>

¹ *International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).*

4. In its statement of grounds the opponent submits:

“3. The Opponent contends and will show that the logo Trade Mark which is the subject of the Application, is closely similar to the earlier rights identified in the Notice of Opposition, and is seeking protection for goods in Classes 29 and 30 which are identical or similar to those for which the earlier rights identified in the Notice of Opposition are registered in the UK, such that there exists a likelihood of confusion on the part of the public, which includes a likelihood of association with the Opponent’s earlier mark.”

5. On 17 October 2012, the applicant filed a counter statement in which it denied the grounds upon which the opposition is based. It states:

“21...it is denied that the Opponent’s Mark is similar to the Applicant’s Mark, but instead is visually, aurally and conceptually different...”

6. In respect of the parties’ goods the applicant states:

“25. It is admitted that there is an overlap between some of the goods.”

7. The opponent’s mark is an earlier marks not subject to proof of use because, at the date of publication of the applications, it had not been registered for five years.²

8. Both parties filed evidence; neither party asked to be heard and both filed written submissions in lieu of attendance at a hearing.

EVIDENCE

The opponent’s evidence

9. The opponent’s evidence consists of a witness statement by Ibrahim Hayel Saeed, the authorised representative for the opponent company. It is dated 18 December 2012. There are no exhibits attached to the statement. The main facts emerging from Mr Saeed’s statement are, in my view, as follows:

“2. [The opponent company] first adopted the GREEN FARMS (Logo) in November 2001. Subsequently, the Trade Mark has been used continuously in a wide number of countries in relation to the broad range of goods and services listed in the specification...”

3. My Group Company was established over fifty years ago...Today, the group comprises ...some 61 companies/subsidiaries; grouped into 5 business sectors. It has global reach with offices/subsidiaries located in 18 countries on 5 continents around the globe...

...

5. My Company’s products (bearing the Opponent’s Trade Mark) have enjoyed significant turnover in the worldwide [sic].

² See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations 2004: SI 2004/946) which came into force on 5th May 2004.

6. *The Trade Mark GREEN FARMS has been marketed aggressively in Saudi Arabia as well as across the GCC through various mediums such as Satellite television (Arab/Asian Channels), Radio, Outdoor (Megacoms, Mupi, LED Screens), In-store (LCD, Shelf Screens, Brochures, Shelf Dividers, Sampling/Tasting Sessions), In-mall (Mupi, Banners), Print (Newspapers, Magazines). Although, the UK market was not targeted directly when communicating the Trade Mark; however, we strongly believe that the brand communication has certainly reached to our target audience (arab/Non-Arabs) who are residing in the UK as they have access to satellite channels in the UK. In addition to the communication, the Trade Mark GREEN FARMS has been actively advertised and promoted every year through conventions such as Gulfood which is the largest Food exhibition in the Middle East.*

7. *The company website was created in the year 2000. The website included the company profile and detailed information on all the products and services provided by the company, including those sold and marketed under the GREEN FARMS logo.”*

Applicant’s evidence

10. The applicant’s evidence comprises a witness statement by Colin Bell, an Associate Solicitor of Brabners Chaffe Street LLP. There are five exhibits attached to the witness statement, which is dated 27 February 2013.

11. At paragraph 4 of his witness statement Mr Bell submits:

“The Opponent’s submissions refer to an ‘international reputation’ with ‘global reach’ in ‘18 countries’. There is no evidence of any such reputation or reach. There is no detail about which countries are referred to. There is no reference in the Opponent’s Submissions to any use, reputation, reach or offices/subsidiaries in the UK. The Opponent appears to be based in Saudi Arabia and by its own evidence conducts its business in Saudi Arabia and the GCC and not the UK.”

12. Mr Bell also states:

“5. There is no explanation of who Ibrahim Hayel Saeed is, or his relationship with the Opponent...”

6. Paragraph 9 of the Opponent’s Witness Statement makes it clear that the Opponent’s business is focussed in the country where the Opponent is based, Saudi Arabia.”

13. In respect of the opponent’s website, Mr Bell submits:

“7. I refer to paragraph 7 of the Opponent’s Witness Statement [which] refers to the OKAM company website at www.okam.com and indicates that it provides information on all products and services provided by the company including those sold and marketed under the Green Farms logo.”

14. Exhibit CPB1 is a print taken from the opponent company's website, dated 18 February 2013. It shows a holding page which features nine squares. The central square contains the company name. The squares contain images, though the quality of the image is such that I am unable to identify them. Below the squares are the words 'UNDER DEVELOPMENT'. Mr Bell says of this exhibit,

"No use is made of the Opponent's Mark on this page. There does not appear to have been any use of the website www.okam.com prior to this holding page."

15. Exhibit CPB2 consists of prints from Wayback Machine which Mr Bell concludes show:

"that from November 1999 to at least 14 November 2011 the website simply resolved to a holding page indicating that the domain name was for sale."

16. Exhibit CPB3 consists of further prints from Wayback Machine which Mr Bell concludes show that until at least October 2003 the opponent company's website showed an 'Under Construction' holding page and that no use was made of the opponent's mark. The first seven pages of the exhibit show a blank square with a small cross in the top left corner of the type that indicates a picture has not been downloaded correctly. Across the square are the words 'UNDER CONSTRUCTION'. Below the square are the words 'WELCOME TO www.okam.com.sa.'

17. The eighth page of the exhibit is poorly reproduced, so it is not possible to make out its content. The ninth page contains a small square in the bottom right hand corner which contains an image, though this is not clear. The wording above the image states: 'GREEN FARMS TUNA'. The remaining four pages consist of a list of head offices and two pages which I cannot make out due to the quality of the reproduction.

18. Exhibit CPB4 consists of six pages from Wayback Machine. The top of each page features areas of grey which I presume to be images, though I cannot make them out. The name of the opponent company is visible across one of the lighter squares on the top left corner of each page. On the first page there are two small squares half way down the page. The left square contains an image which I cannot determine. The square on the right of the page has the image missing. The words 'GREEN FARMS TUNA' are visible above the left square. The second page of this exhibit has three blank squares: two on the left of the page and one on the right. The words 'Green Farms Tuna' are visible above the bottom left square. The third page is identical to the second. The fourth page contains two blank squares, of which the one on the right has the words 'Green Farms Tuna' presented above it. The fifth and sixth pages are identical to the fourth. Mr Bell concludes:

"Exhibit CPB4 indicates that the Opponent's Mark as filed does not appear to be used on the website. However, it is noted that the Opponent's [sic] does use the mark GREEN FARMS, but only in relation to tinned tuna."

19. Exhibit CPB5 is described by Mr Bell as prints from the Applicant's website from 3 February 2011, using Wayback Machine. It consists of ten pages, accessed on 19 February 2013. The pages are very poor quality to the extent that it is not possible to make out the products which are shown on these pages. However, the applicant's mark, as applied for, is clearly visible in the top left of each page.

Opponent's evidence in reply

20. The opponent's evidence in reply consists of a witness statement by Julia House, a partner at Albright Patents LLP. It is dated 18 June 2013 and has one exhibit attached. The key points arising from this witness statement are as follows:

"4. For clarity, the Opponent's UK Registration upon which the Opposition is being based, is not yet 5 years old (it was filed on 8 February 2011), and as such there is no requirement to show use or reputation anywhere, including the UK as yet.

5. Ibrahim Hayel Saeed is the Managing Director of the opponent company.

...

7. It is acknowledged in paragraph 7 of the Witness Statement of Colin Bell that the Opponent's website is '...currently under development and there is a holding page.'"

21. Ms House confirms that this continues to be the case and at exhibit JAH1 provides a print of the current holding page. The page depicted was accessed on 17 June 2013 and consists of three rows of four squares each containing an image of an item of food or drink. The opponent company's name is presented above the images. Below the images are ten brands which Ms House describes as *"brands controlled and used by the Opponent"*. The first of these is a green oval which contains the words 'GREEN FARMS' presented in yellow text, above lighter green hills.

22. That concludes my summary of the evidence. Both parties, in lieu of a hearing, filed submissions to which I will refer as necessary, below.

DECISION

23. Section 5(2)(b) of the Act reads as follows:

"5. - (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, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

Section 5(2)(b) case law

24. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the CJEU cases mentioned) on the basis indicated below:

The CJEU cases

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; *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-6/01; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04; *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P.

The principles

“(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, 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, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) 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;

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

The average consumer and the nature of the purchasing act

25. In accordance with the above cited case law, I must determine who the average consumer is and also identify the nature of the purchasing process. The average consumer is reasonably well informed and reasonably circumspect and observant but with a level of attention likely to vary according to the category of goods. The attention paid is likely to vary depending on price and, to some extent, the nature of the goods and the frequency of the purchase.

26. The average consumer of the goods at issue will be a member of the general public. The purchase is likely to be primarily visual as it is likely to be made from a website or directly from a shelf. These are relatively low value, fairly frequent purchases though, in my view, the average consumer will pay a reasonable degree of attention, to the extent that they will consider, inter alia, ingredients, nutritional value and flavour.

Comparison of goods

27. The goods to be compared are as follows:

The opponent’s goods	The applicant’s goods
<p>Class 29: Meat, fish, poultry and game; meat extracts; tuna meat of all types; preserved, dried canned and cooked fruits and vegetables and beans; meat and chicken gravies; jams, jelly; milk and other dairy products; concentrated and sweetened milk and powder milk; creams; chips of all types; snacks; corn flakes and crisps; eggs; yoghurt (dairy products); edible oils and fats; preserves and pickles, in class 29.</p>	<p>Class 29: Cooked sliced meats excluding venison; natural torn chicken; turkey; ham; roast beef; roast pork; cooked snack products made from chicken, turkey, ham, beef and pork but excluding venison; prepared snack foods.</p>
<p>Class 30: coffee and tea, cocoa, sugar, rice of all types; tapioca, sago, coffee substitutes, flour and preparations made from cereals, bread, biscuits, chocolates of all kinds stuffed with dried fruits; noodles; pasta; cakes, pastry and confectionery, pastes, ices, honey, treacle, yeast, baking powder, salt, mustard, pepper, vinegar, sauces, ketchup sauces; tomato pastes; spices and condiments, ice, nuts; fresh pastries; popcorns; snack foods; potato chips.</p>	<p>Class 30: Flavourings made from meat excluding venison; meat pies excluding venison; poultry and game meat pies.</p>

The opponent's goods	The applicant's goods
<p>Class 31: Agricultural-horticultural and forestry products and grains (not included in other classes), living animals, fresh fruits and vegetables and beans, seeds, live plants and flowers, foodstuffs for animals, malt; feeds; fattening feeds; coconuts fruits; fruits of pistachio; shrubs; natural fruits trees.</p>	
<p>Class 32: Non-alcoholic mineral and aerated waters and other non-alcoholic drinks, non-alcoholic beers; non-alcoholic black beers; syrups and other preparations for making non-alcoholic beverages; juices and refreshments.</p>	

28. In comparing the goods, I bear in mind the following guidance provided by the General Court (GC) in *Gérard Meric v OHIM*, Case T-133/05:

“29. ...goods can be considered identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

29. Other factors which may be considered include the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 (hereafter *Treat*) for assessing similarity between goods and services:

- (a) the respective *uses* of the respective goods or services;
- (b) the respective *users* of the respective goods or services;
- (c) the *physical nature* of the goods or acts of service;
- (d) the respective *trade channels* through which the goods or services reach the market;
- (e) in the case of self-serve consumer items, where in practice they are found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) the extent to which the respective goods or services are competitive, taking into account how goods/services are classified in trade.

30. I also bear in mind the decision in *El Corte Inglés v OHIM* Case T-420/03, in which the court commented:

“96...goods or services which are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods or provision of those

services lies with the same undertaking (Case T-169/03 Sergio Rossi v OHIM-Sissi Rossi [2005] ECR II-685).”

The applicant's goods in class 29

31. In its submissions the applicant accepts that “there is overlap” between ‘cooked sliced meats excluding venison; natural torn chicken; turkey; ham; roast beef and roast pork’ in its own specification and ‘Meat, fish, poultry and game’ in the opponent’s specification. I agree, in accordance with the principles in *Meric*, these are identical goods.

32. In respect of the remaining goods the applicant states:

“69. The Opponent’s Mark does not cover the following goods which are covered by the Applicant’s Mark:

“cooked snack products made from chicken, turkey, ham, beef and pork but excluding venison; prepared snack foods.”

33. The opponent states:

“It is clear that the applicant’s goods are entirely comprised within and covered by the scope of the Opponent’s goods.”

34. The opponent’s specification includes the term ‘snacks’ which is a broader term that would include ‘cooked snack products made from chicken, turkey, ham, beef and pork but excluding venison; prepared snack foods’. Consequently, I also find these goods to be identical.

The applicant's goods in class 30

35. The applicant does not accept any degree of similarity between the parties’ goods in class 30. The opponent concludes, as above, that the applicant’s goods are ‘entirely comprised within’ its own specification.

36. ‘Flavourings made from meat excluding venison’ can be included within ‘meat extracts’, and ‘meat gravies’, in the opponent’s class 29 specification or within ‘sauces’ and ‘condiments’ in class 30 of its specification. Consequently, I find these goods to be identical.

37. ‘Meat pies excluding venison’ and ‘poultry and game meat pies’ can be included within the broad term ‘pastry’ in the opponent’s specification and can also be included in the term ‘snacks’ as appear in the specification of goods in class 29 and ‘snacks foods’ as appear in class 30.

38. In conclusion, I find each of the applicant’s goods in classes 29 and 30 to be identical to goods covered by the earlier mark.

Comparison of marks

39. The marks to be compared are as follows:

The opponent's mark	The applicant's mark
	

40. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components³, but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

41. The opponent's mark consists of two ovals, one above the other. The top oval contains Arabic script above an area of lines and shading which both parties refer to, throughout their submissions, as fields. The top right hand side of the oval contains a thin curved sliver in a lighter colour which gives the impression of a highlight. The lower oval consists of all of the same elements but with the Arabic script replaced by the words 'GREEN FARMS' in capital letters, the word 'GREEN' presented directly above the word 'FARMS'.

42. The applicant's mark consists of a misshapen circle, which the applicant describes as 'an irregular convex triangular shape'. Within the shape are the words 'Green' and 'farm' which the applicant submits are 'heavily stylised', though in my view the words are fairly standard in presentation. The word 'Green' is presented above the word 'farm'. The 'm' of 'farm' takes the form of the tines of a fork, the handle of which extends from the centre of the letter and terminates at the end of the word 'Green'. At the top of the shape is a crescent shaped sliver which begins at the top left of the shape and terminates close to the top of the fork handle, resembling a highlight. The words 'FRESH FOODS' appear in upper case below the 'farm' element of the mark and are considerably smaller than the aforementioned elements.

43. With regard to the distinctive and dominant elements of their respective marks the applicant states:

"5...the Opponent's Mark consists of two entirely separate and distinct uniform oval elements, one directly above the other, the top oval element containing Arabic wording above a field motif, the bottom oval element containing the

³ *Sabel v Puma AG, para.23*

words 'GREEN FARMS' in capital letters in an unstylised basic font above a field motif.

...

20. The Opponent either erroneously or disingenuously refers to its mark throughout its Opposition, Statement of Grounds, Submissions and Evidence as 'GREEN FARMS'. However, this deliberately ignores the other elements of the Opponent's Mark. Moreover the other elements are the arguably distinctive and dominant elements of its mark when perceived and addressed as a whole."

44. The opponent states⁴:

"The distinctive and dominant element in the respective Trade Marks is the word element GREEN FARM. When the average consumer or relevant public observes the Trade Marks they are identical with regard to the distinctive and dominant element. As such, although the average consumer normally perceives a Mark as a whole and does not proceed to analyse its various details, the fact remains that, when perceiving a verbal sign, he will break it down into elements which, for him, suggest a concrete meaning or which resemble words known to him. In the present case the English words GREEN FARM, which both of the Marks at issue contain, will attract the attention of the average consumer on account of its appearance as instantly recognisable words to which they can immediately associate a commonly recognised meaning."

45. Both oval shapes in the opponent's mark, the 'fields' and the thin highlight lines, will be considered decoration and will not be afforded any trade mark significance by the average consumer. In respect of the upper oval in the mark, the average consumer in the UK is unlikely to be familiar with the meaning of the words presented in Arabic script. Consequently, the average consumer will refer to and recall the mark by reference to the plain English words 'GREEN FARMS'. It is these words, in themselves, an independent element of the mark, which are the distinctive and dominant element of the opponent's mark as a whole.

46. The background shape of the applicant's mark and highlight will be considered decorative and will not be given any trade mark significance by the average consumer. Similarly, the letter 'm' which is represented by a fork is not particularly distinctive for foodstuffs and will, in any event, be clearly seen as a letter 'm', the fork not detracting in any way from the word being read as 'farm'. The words 'FRESH FOODS' are descriptive of the applicant's goods in classes 29 and 30 and are considerably smaller than the remaining words in the mark. They will not be afforded any trade mark significance. The distinctive and dominant element of the applicant's mark is the words 'Green farm'.

Visual similarities

47. The opponent submits:

"...the attention of the average consumer will be attracted to the verbal elements within the marks. In addition, it should be considered that the average consumer only rarely has the chance to make a direct comparison between two different Marks at issue, but must rely on the imperfect picture of them that he has

⁴ The opponent's submissions are neither paginated nor are the paragraphs numbered

retained in his mind. This is particularly the case where the goods to which the Marks are being applied are essentially fast moving consumer goods, and so very little time will be spent in deliberating the purchase.

Taking the above reasoning into consideration, at a glance the average consumer will not pay close attention as to whether the identical word elements are appearing on an oval background or on an irregular convex triangular shape, neither will they have any regard as to whether a flash is appearing from the left corner or the right corner of the background shape.”

48. The applicant submits:

“58...the Opponent’s Mark and the Applicant’s Mark are both heavily stylised and are dissimilar for a number of reasons:

58.1 Firstly, the Opponent’s Mark has two oval/lozenge backgrounds. The Applicant’s Mark by contrast has one irregular convex triangular element as its background.

58.2 Secondly. [sic] the Opponent’s Mark’s primary feature is an oval lozenge containing Arabic words. There are no Arabic words in the Applicant’s Mark.

58.3 Thirdly, beneath the primary feature in the Opponent’s Mark is a secondary lozenge containing the words GREEN FARMS in an unstylised basic font. The Applicant’s Mark features the words ‘Green Farm’ in a highly stylised font, with an inverted pitchfork representing the letter “m”. Beneath this it has the additional words ‘FRESH FOODS’.

58.4 Fourthly, both lozenges in the Opponent’s Mark contain a field motif at the bottom, the Applicant’s Mark has no field motif.

59. The overall impression given by the Applicant’s Mark and the Opponent’s Mark are therefore entirely dissimilar.”

49. The applicant further submits, at paragraph 60 of its submissions, that if the opponent’s mark consisted “only of the subordinate GREEN FARMS oval element, the marks would still be dissimilar for the following reasons:

The opponent’s mark contains the word ‘farms’ plural rather than farm in the applicant’s mark.

The opponent’s mark does not include the words FRESH or FOODS.

The opponent’s mark is presented in capital letters.

A stylised font is used for the applicant’s mark, it is not present in the opponent’s mark.

The fork device present in the applicant’s mark is not present in the opponent’s mark.

The entirely distinct background shapes.

The dominant field element in the opponent's mark which is not present in the applicant's mark.

The lighter coloured flash elements being on opposite sides of the marks.

The flash element of the opponent's mark makes it look three dimensional, the applicant's does not."

50. Any similarity between the marks rests in the word elements 'GREEN FARMS' and 'Green farm', which are the dominant and distinctive elements of both marks. As discussed above, the remaining elements are unlikely to be afforded any origin significance by the average consumer. Taking these factors into account I find there to be a fairly high degree of visual similarity between the marks.

Aural similarities

51. The opponent submits:

"The average consumer in the UK would overlook the Arabic wording appearing within the opponent's mark as they would not know how to pronounce this. As such, if seeking to order or refer to the Opponent's product they would identify it as the GREEN FARMS brand. In the case of the Applicant's product, there is no other way to refer to it phonetically other than the GREEN FARM brand and as such, there is a phonetic identity between the marks and, in the alternative there is near similarity."

52. The applicant submits that the Arabic element and pluralising of the word 'FARM' in the opponent's mark and the 'FRESH FOODS' element of the applicant's mark result in the marks being phonetically dissimilar.

53. The marks will be pronounced 'GREEN FARMS' and 'GREEN FARM': they are aurally very highly similar.

Conceptual similarities

54. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.⁵ The assessment must be made from the point of view of the average consumer.

55. The applicant submits:

"64. Conceptually, the distinctive Arabic wording appearing in the Opponent's mark gives the impression that the Opponent's Mark emanates from or has an

⁵ This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R. 29.

association with an Arabic speaking territory. This is completely absent from the Applicant's Mark.

65. The field motif and oval shape of the Opponent's Mark are also conceptually different from the irregular convex triangular shape and pitchfork motif of the Applicant's Mark."

56. In its submissions the opponent maintains that, *"the Trade Marks in issue are conceptually similar, both containing the identical word element GREEN FARM..."*

57. The conceptual impression provided by both parties' marks is either that of a farm or farms belonging to someone called GREEN, or a farm or farms which are in some way environmentally sound. Whatever the average consumer's interpretation of the words actually is, it will be the same in respect of both marks. I have already concluded that the additional words 'FRESH FOODS' in the applicant's mark are non-distinctive for the goods applied for. Taking all of these factors into account, I find the marks to possess a very high degree of conceptual similarity.

Distinctive character of the earlier mark

58. I must now assess the distinctive character of the opponent's earlier trade marks. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services for which it is registered and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

59. In its submissions, the opponent makes no claim that its earlier trade mark has acquired any enhanced distinctive character through the use made of it. I have only the inherent characteristics of the trade marks to consider. The words 'GREEN FARMS' are not possessed of the highest level of distinctiveness when used in respect of the products in 29, 30, 31 and 32. The mark is, in my view, possessed of an average level of inherent distinctive character.

Likelihood of confusion

60. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.⁶ I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa.

61. I have found the marks to have a fairly high degree of visual similarity and a high degree of aural and conceptual similarity. I have found an average level of inherent

⁶ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*, paragraph 27

distinctive character in the earlier mark and have found the applicant's goods to be identical to the opponent's goods. I have identified the average consumer, namely a member of the general public and have concluded that the purchase will be primarily visual, fairly frequent and of low value. The level of attention paid to the purchase will be reasonable to the extent that the average consumer will consider, inter alia, ingredients, nutritional value and flavour.

62. Taking all of these factors into account the similarity of the marks is such that in the context of goods which are identical there will, in my view, be direct confusion (where the average consumer believes the respective goods originate from the same or a linked undertaking). Even if I am wrong in this, the similarity between the parties' marks is such that there will be indirect confusion (where the average consumer believes the respective services originate from the same or a linked undertaking).

Costs

63. The opposition having succeeded, the opponent, is entitled to a contribution towards its costs. I have taken into account that no hearing has taken place, but that the opponent filed written submissions in lieu of a hearing. The evidence filed by the opponent was not of any relevance in reaching a decision in these proceedings. I make the award on the following basis.

Preparing a statement and considering the other side's statement:	£ 300
Preparing evidence and considering the other side's evidence:	£ 200
Written submissions:	£ 300
Official fee:	£ 200
Total:	£ 1000

64. I order Kenneth Greene to pay Omar Kassem Alesayi Marketing Co Ltd the sum of £1300. This sum is to 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 4th day of October 2013

**Ms Al Skilton
For the Registrar**