

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER 3222086

BY CAMBRIDGE NUTRACEUTICALS LIMITED

TO REGISTER THE FOLLOWING MARKS IN CLASS 5

1.



TURMERIC+

2.



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TO REGISTER THE FOLLOWING MARKS IN CLASS 5:**

1.

The image shows the word 'TURMERIC+' in a bold, red, sans-serif font. The text is centered within a horizontal rectangular area that has a grey background, which is itself set against a white background.

2.

The image shows the word 'TURMERIC+' in a bold, red, sans-serif font. The text is centered on a plain white background. A small superscript '1' is located at the bottom right of the plus sign.

Background

1. On 30 March 2017, Cambridge Nutraceuticals Limited ('the applicant') applied to register the marks for the following goods:

Class 5: Pharmaceutical and sanitary preparations; dietary supplements; dietetic food preparations; nutritional supplements; vitamin and mineral preparations; food supplements; pharmaceutical and medicinal preparations for the skin and hair; health food supplements made principally of vitamins; vitamin supplements for foodstuffs for human consumption; vitamin tablets; vitamin supplements.

2. On 13 April 2017 the Intellectual Property Office ('IPO') issued an examination report in response to the application. In that report the following objections were raised under Sections 3(1)(b) and 3(4):

Section 3(1)(b)

"The application is not acceptable in Class 5. There is an objection under Section 3(1)(b) of the Act as the marks are devoid of any distinctive character. This is because the marks consists of the word TURMERIC and a plus symbol. Turmeric is a spice of the ginger family and is renowned for its wide range of health benefits. The addition of the plus sign only serves to indicate the goods are offering something additional. Therefore the average consumer would not consider these signs to be badges of origin. They would assume the goods contain turmeric, added especially to provide extra benefits to the consumer."

Section 3(4)

"The application is not acceptable in Class 5 as there is an objection under

¹ The representations of the marks may not appear perfect but are taken from the official record on the electronic file. It has been assumed for the purposes of this decision that the grey background fully surrounds the red cross in the first mark and that, in the second, the red cross is consistently the same shade of red against a white background.

Section 3(4) of the Act. This is because the marks contain a specially protected emblem, namely the Red Cross which is protected under Section 6(1) of the Geneva Conventions Act 1957.

Further advice concerning the Red Cross emblem may be sought from the Head of International Law at the British Red Cross.”

3. In a letter dated 15 May 2017 Mewburn Ellis ('the attorney') requested a hearing to discuss the objection raised under Section 3(4) only. The attorney went on to say that if the Section 3(4) objection was waived the applicant intended to file arguments as well as evidence of acquired distinctiveness in response to the objection under Section 3(1)(b). At the hearing, the applicant was, in fact, represented by two attorneys, Jacqueline Pang and Stephen Hodsdon, both of Mewburn Ellis.

4. The objection under Section 3(4) was maintained at the hearing on 19 July 2017 and on 20 July 2017 I sent the agent a report of the hearing, together with a notice of refusal of the application. The grounds for refusal were stated in the hearing report as being under section 3(4) of the Act, and failure to comply with that section necessarily resulted in refusal under section 37(4). Thus, the separate ground of refusal under section 3(1)(b), originally raised by the examiner, was not formally discussed or considered. On 21 August 2017 the attorney submitted a form TM5 requesting a statement for the reasons for the decision. I am now asked under section 76 of the Trade Marks Act 1994 and rule 69 of the Trade Marks Rules 2008 to state in writing the grounds of my decision and the materials used in arriving at it.

5. I should say by way of introduction that, to my knowledge, refusal of an application on the grounds that a mark contains a 'protected emblem', and one whose use is prohibited in law, in this case the red cross emblem, does not commonly occur. For that reason, coupled with the seemingly complex framework of international and domestic law which protects the red cross emblem, I have found it necessary to set out that framework, including commentary, by way of background in some detail.

6. I should say, about the commentary material, which is presented as footnotes, that whilst the applicant has not had formal opportunity to comment on this material as such, I regard it, first and foremost, as background material which is helpful by way of information only. In other words, I would have arrived at the same decision by virtue of the legal provisions alone, coupled with the registrar's published guidance to which I was referred by the attorneys, and even without the commentary material. The commentary material has undoubtedly served, however, to reinforce me in my decision.

7. Perhaps it is also necessary, especially in the event of any appeal to set out my understanding as to the legal standing or authority of the commentary material. The International Committee of the Red Cross ('ICRC') commentaries are widely recognised as an authoritative source of guidance on and contextualisation of the rules of the 1949 Geneva Conventions, covering both their interpretation and practical application. Referring to the ICRC Commentaries to the 1949 Geneva Conventions, published in the 1950s and 1960s, one author has written: "Since their publication, these commentaries have become an authoritative interpretative guide for States, armed forces, national and international courts, academics and civil society" (Jessica

Dorsey, <http://opiniojuris.org/2016/06/22/introducing-the-first-multi-blog-series-on-the-updated-geneva-conventions-commentaries/>).

8. The ICRC commentaries to the 1949 Geneva Conventions and to their 1977 Additional Protocols are, furthermore, respected by the UK Government itself. As an example, the UK submission to the International Court of Justice in the *Nuclear Weapons Case* (Advisory Opinion) of 1996 frequently cites the ICRC's commentary to the Additional Protocols. Further, the UK Supreme Court has cited approvingly the original ICRC commentary to the First Geneva Convention of 1949 (published in 1952) in a recent case on the application of the European Convention on Human Rights to extra-territorial military operations in Iraq ([Al-Waheed v MoD \[2017\] UKSC 2](#) at page 264).

9. My approach will be, firstly, to set out the various provisions of both international and domestic law (together with commentary footnotes) which protect the red cross emblem from use. Having completed this necessary recital I will come to my substantive decision, taking account of course of the applicant's submissions at hearing.

The law

10. International framework

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva 12 August 1949

Chapter VII. The Distinctive Emblem

Art. 38. (1) As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces.

(2) Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, those emblems are also recognized by the terms of the present Convention²

² The ICRC has published commentary on Art 38 which is referred to (in full) as ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition, 2016*, or (in brief) as ICRC, *Commentary on the First Geneva Convention, 2016*. This web page can be referred to as: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>. The commentary on Art 38 reads as follows:

"3. Form and status of the emblem

2541 Article 38 refers to the 'heraldic emblem of a red cross on a white ground, formed by reversing the Federal colours'. The form of the red cross emblem is not rigidly defined, but in practice normally consists of a red cross with arms of equal length, wholly surrounded by a white ground. Article 18 of the 1906 revision of the 1864 Geneva Convention affirmed that the sign of the red cross is intended as a reversal of the flag of Switzerland, which provides some guidance as to its shape or form. The essence of that statement was retained in subsequent revisions and has also been useful in reasserting the non-religious nature of the emblem. The precise forms of the red crescent emblem and of the red lion and sun emblem are similarly undefined. The Convention does not prescribe a

Chapter IX. Repression of Abuses and Infractions

Art 49-52 [omitted]

Art. 53. The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation " Red Cross " or " Geneva Cross " or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.

By reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours, and of the confusion which may arise between the arms of Switzerland and the distinctive emblem of the Convention, the use by private individuals, societies or firms, of the arms of the Swiss Confederation, or of marks constituting an imitation thereof, whether as trademarks or commercial marks, or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment, shall be prohibited at all times.³

particular shade of red for the emblems. National legislation on the use of the emblems may set out more detailed descriptions as to their respective forms.

2542 The intention in using the words 'heraldic emblem' from 1906 onwards was to reinforce the non-religious nature of the red cross sign. In practice, this has also had the effect of giving the red cross emblem the same standing as official arms, thus encouraging States to enact legislation to protect the emblem. However, this has led to some confusion as to whether the red cross emblem is in fact a heraldic sign. The reference to the 'Federal colours' supports the fact that, while the emblem was intended to be equated with the heraldic emblem of the Swiss Confederation, it was not to be considered a heraldic sign itself."

³ Commentary from the same source as above is also provided in relation to Art 53 as follows:

"C. Unique nature of protection

3073 In proscribing, in very broad terms, the use of the distinctive emblems (as well as use of the arms of the Swiss Confederation, relevant designations, and imitations) by any, other than those entitled to use them, Article 53 serves to reinforce the special purpose and unique status of these signs. There are some other internationally recognized symbols that enjoy a certain level of protection under specific international agreements or resolutions. For example, under international humanitarian law, there are other signs designated for specific purposes (such as to protect cultural property in armed conflict), the use of which may also be restricted by national legislation. In addition, use of the emblem and flag of the United Nations is restricted, and the UN General Assembly has recommended the implementation of national measures to prevent its unauthorized use. However, the very wide prohibition on the use of the distinctive emblems by third parties set out under Article 53, coupled with the positive obligation of States, established in Article 54, to take appropriate national measures to repress instances of abuse and misuse, constitutes a level of protection over and above that afforded to other internationally recognized signs. The prohibition is wide enough to cover such use wherever it may occur and in whatever form. For example, while this could not have been foreseen at the time of drafting, the prohibition extends to unauthorized use of the distinctive emblems, their designations, and imitations thereof in the digital sphere and on the internet. It is the responsibility of States to ensure that private and/or commercial organizations uphold the restrictions set out in Article 53.

D. Discussion

1. Paragraph 1: Red cross emblem, related designations, and imitations

3074 Article 53(1) covers the use of the red cross emblem and the designations 'Red Cross' and 'Geneva Cross', as well as imitations of these. While many national laws refer both to the red cross emblem and to the designation 'Red Cross' in conformity with this paragraph, it does not appear that a great number explicitly prohibit the use of the designation 'Geneva Cross'. Many national laws also prohibit the use of imitations of the red cross emblem, as well as imitations of the designation 'Red Cross'. It is for each individual State to determine those signs that may constitute an imitation of the emblem or of related designations. Particular formulations may be included in the national legislation itself. In addition, in some countries the question of which designs or wording may constitute an imitation in their territory has arisen in their national case law. The observance of these rules in practice is further considered in section E below.

3075 [omitted]

3076 This paragraph also sets out categories of third parties for whom the use of the emblem and related designations is prohibited, namely 'individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention'. These categories are intended to be exhaustive, rather than restrictive: in effect, the use of the emblem is forbidden to everyone not authorized by the Convention. This view was confirmed by delegates to the 1949 Diplomatic Conference, who considered that the prohibition on use set out in Article 53 was 'rendered absolute'. In general, national laws giving effect to Article 53 follow this interpretation: rather than identifying the specific persons or bodies unable to use the emblem, designations and related signs, the prohibition extends to all individuals and entities not explicitly entitled to do so under Article 44.

3077 Article 53(1) prohibits the use of the red cross emblem and related designations 'whatever the object of such use'. This means that the emblem or related designations cannot be used, except as provided for in the Convention, for any reason, however commendable, including for any other humanitarian purpose. The phrase effectively prevents any arguments being brought by unauthorized users that their use of the emblem or designations is justified, either because there was no intention to represent the true purpose of the emblem or because the use is for a purpose similar to that of the emblem.

3078-3091 [omitted]

E. National implementation of Article 53

3092 Available national practice on Article 53 suggests that, although implementation varies greatly from country to country, the provision is generally applied in practice. As indicated above, a great number of States have enacted legislation giving effect to Article 53, often in more expansive terms than those of the provision itself. As mentioned previously, national legislation normally prohibits both commercial misuse of the emblems and wartime abuses. Where misuse of the emblem occurs, it is often perpetrated by entities and individuals within the medical, health and first-aid sectors, suggesting that a great many instances stem from a wrong understanding of the true meaning of the distinctive emblems. There is also a particular risk of misuse of the indicative sign or National Society logo, name, or imitation thereof, for fraudulent purposes. This may be the case, for instance, in attempts to divert funds intended for Movement components in support of their humanitarian activities.

3093 Many National Societies play a key role in supporting their governments' implementation of Article 53. The ICRC may also assist in these efforts, where required, in order to build national capacity. The International Federation of Red Cross and Red Crescent Societies may assist too, when requested. Such a role is normally carried out by instigating a dialogue with each alleged misuser. The experience of a number of countries indicates that the implementation of Article 53 through legal action is a rarity; most of the time, on being contacted by the National Society, the misuser will agree to cease use of the emblem, designation or imitation thereof. While this outcome is positive and preferable, from the perspective of emblem protection, it may in fact be useful for court proceedings to be initiated, where required, in order to raise awareness of the significance of the emblems and of the legal restrictions on their use. Such actions would also demonstrate publicly the will of States to give effect to their international and domestic legal obligations.

11. National framework

Geneva Conventions Act 1957

Section 6

6 Use of Red Cross and other emblems.

- (1) Subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Secretary of State, to use for any purpose whatsoever any of the following ; that is to say—
- (a) the emblem of a red cross with vertical and horizontal arms of the same length on, and completely surrounded by, a white ground, or the designation "Red Cross" or "Geneva Cross";
 - (b) the emblem of a red crescent moon on, and completely surrounded by, a white ground, or the designation "Red Crescent";
 - (c) the following emblem in red on, and completely surrounded by, a white ground, that is to say, a lion passing from right to left of, and with its face turned towards, the observer, holding erect in its raised right forepaw a scimitar, with, appearing above the lion's back, the upper half of the sun shooting forth rays, or the designation "Red Lion and Sun".
 - (d) the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence;
 - (e) any of the distinctive signals specified in Chapter III of Annex I to the first protocol, being the signals of identification for medical units and transports;
 - (f) the emblem of a red frame in the shape of a square on edge on a white ground, conforming to the illustration in Article 1 of the Annex to the third protocol (and whether or not incorporating another emblem, or a combination of emblems, in accordance with Article 3 of the protocol), or the designation "Red Crystal" or "third Protocol emblem"]
- (2) Subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Secretary of State, to use for any purpose whatsoever—
- (a) any design consisting of a white or silver cross with vertical and horizontal arms of the same length on, and completely surrounded by, a red ground,

3094 National Societies may also encourage adherence to Article 53 by conducting awareness-raising campaigns on the true meaning of the distinctive emblems and the restrictions on their use within their territories."

being the heraldic emblem of the Swiss Confederation, or any other design so nearly resembling that design as to be capable of being mistaken for that heraldic emblem;

- (b) any design or wording so nearly resembling any of the emblems or designations specified in the foregoing subsection as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems.
- (c) any design so nearly resembling the sign specified in subsection (1)(d) of this section as to be capable of being mistaken for that sign;
- (d) any signal so nearly resembling any of the signals referred to in subsection (1)(e) of this section as to be capable of being mistaken for one of those signals.

12. Trade Marks Act 1994

Section 3(4)

A trade mark shall not be registered if or to the extent that its use is prohibited in the United Kingdom by any enactment or rule of law or by any provision of Community law.

Decision

Brief history of the red cross emblem

13. The red cross emblem was adopted under the original Geneva Convention of 1864 and is an inversion of the Swiss Federal Flag. It was originally intended as a symbol of 'protection' for those wounded and sick and those who care for them. Thus, the primary users of the emblem were, and remain, the armed forces' medical services. Subsequently the emblem has also come to be used indicatively by the ICRC, National Red Cross Societies and Red Crescent Societies, mostly in peacetime and to indicate the activities of those societies, such as, e.g. fundraising.

The Geneva Conventions Act 1957

14. This leads to the UK's own national provisions to enact its international obligations as recited above. These are in the form of the Geneva Conventions Act 1957 ('GC Act') as above. It is important to note, firstly, that just as the formative international instruments have ended up, understandably shy of strictly defining or 'fixing' the red cross emblem, in terms e.g. of its precise shade of red and/or white, its dimensions or precise overall configuration⁴, so too has the UK's own GC Act, beyond saying, under

⁴ Although Annex 1 to Protocol Additional 1 to the Geneva Conventions of 1949: Regulations concerning identification, as amended on 30 November 1993, at Art 4 entitled 'Shapes', provides that the High Contracting Parties 'may be guided' by models shown in 'Figure 2'. I have not reproduced Figure 2 here since the provision is plainly intended not to be prescriptive and what ultimately matters is what is set out in our national law.

section 6(1)(a), that it is, a “red cross with vertical and horizontal arms of the same length on, and completely surrounded by, a white ground,.....”

15. Secondly, it is also important to state clearly that the GC Act, in accordance with its international obligations under Art 53, seeks to include within its terms of protection, emblems which are, to use the words of section 6(2)(b) of the Act:

(b) any design or wording so nearly resembling any of the emblems or designations specified in the foregoing subsection as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems.

16. In terms of legal construction, I should say that I have interpreted the words ‘foregoing subsection’ in section 6(2)(b) above, as referring to section 6(1), the red cross being one (the first) of the emblems listed in section 6(1), at section 6(1)(a).

17. My purpose in setting out at length the detailed protection afforded this particular emblem, which is unique in international humanitarian law, is to set the scene that form of the red cross emblem, whatever anyone, including the registrar’s own published guidance may suppose it to be, is *not actually legally fixed or defined in international or UK national law*. This leaves national jurisdictions some, perhaps limited, measure of flexibility in terms of the scope of their own national enactments. Those enactments must, however, include within their scope, ‘imitations’ of the emblem in accordance with Art 53 of the Geneva Convention itself.

Has there been consent?

18. The crux of this case then revolves around the question whether the use of the marks, the subject of this series application, would be likely to be prevented by law by the provisions of either section 6(1) or 6(2)(b) of the GC Act. If so, the application must be refused under section 3(4) of the Trade Marks Act 1994, and assuming the applicant has no authority or consent from the relevant bodies to use the marks. That relevant body is termed the ‘Secretary of State’ under section 6(1) of the GC Act and the same under section 6(2)(a). In fact, they are different Secretaries of State; under section 6(1) it is the Secretary of State for Defence (MOD) and under section 6(2)(b) it is the Secretary of State for Business, Energy and Industrial Strategy (BEIS). During the course of proceedings the applicant has mentioned no such authority or consent from either Secretary of State, nor any attempt to get any authority. Finally, nor has it mentioned any approach to the British Red Cross (‘BRC’) with a view to obtaining any such authority. I should perhaps mention that it is usual for a person looking to use any of the emblems subject to the Geneva Conventions, to approach the BRC first, almost as an intermediary, and through whom any approach to the relevant Secretary of State for formal authority is made.

19. Since the applicant in this case has, to my understanding, made no approach to any party in a position to advise on its use of the emblem or the need for authority or to actually provide that authority, I am assuming that the basis of its case starts from the premise that the use of the marks in this case would not be prevented by the GC Act in the first place.

The applicant's case for registration

20. At the hearing, which as I have said above was requested to discuss the objection raised under Section 3(4) only, the attorneys submitted that the first mark in the series did not consist of a representation of the red cross emblem. It was stated that this mark is presented on a grey background, whereas the GC Act and the registrar's Examination Guide, clearly refer to the red cross emblem as being a red cross on a white background. The attorneys did not put forward any arguments for acceptance of the second mark in the series, which includes a red cross on a white background. That said, and at the same time, the attorneys made no express concessions as regards the second mark in the series. In fact, during the hearing the marks were referred to as being 'turmeric plus' marks and a theoretical question was posed, along the lines of what the registrar would do if the mark were a '1 plus 1' mark. This leads me to the conclusion that the sum of submissions is not solely that the first mark has a grey background and thus cannot be the red cross emblem, but that *also*, I must deal with the implied submission, as regards *both* marks, that the 'so called' red cross emblem would, *instead of a red cross emblem, be taken to be a mathematical 'plus' symbol*. I am reinforced in this view, because if I were to assume that there was any concession as regards the second mark, such a position may call into question whether the two marks are, in fact, a series in the first place.

21. It may be recalled, however, that the original objection letter by the registry specified only section 6(1) of the GC Act, rather than, and in addition or alternatively, section 6(2)(b) also. Whilst it may have been preferable to have specified also, and by way of alternative, section 6(2)(b), at least as regards the first mark, I do not think this has resulted in any procedural unfairness to the applicant or otherwise hampered it.

22. At the outset I should stress that, however the red cross emblem may be characterised in the registrar's Examination Guidance, this cannot be taken to supplant or vary the primary provisions to which I have referred already, or the authoritative guidance and commentary provided by the ICRC. In any event, and as I said in my hearing report, the Examination Guide *also* makes reference to emblems which are likely to be mistaken for the red cross, i.e. imitations covered by the terms of the GC Act and required by Art 53.

The effect of immediate background

23. I have no doubt that, as regards the background colour used, that in principle a background other than white is capable of housing an emblem which falls within the 'imitation' terms of section 6(2)(b) of the Geneva Conventions Act 1957, that is:

(b) any design or wording so nearly resembling any of the emblems or designations specified in the foregoing subsection as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems.

24. I am reinforced in that conclusion by a ‘Study on the Use of the emblems: operational and commercial and other non-operational issues’, published in 2012 by the ICRC⁵, which states:

“The Commentary on GC I (Article 53) provides the following examples of imitation of the red cross emblem:

[A] red cross with a figure or another cross superimposed; a cross which had only the outline or part of it in red; *backgrounds of different colours (my emphasis)*; a cross half red and half white on a ground in which the two colours were reversed; a red star which from a distance looked like a cross.”

The following signs depict some other cases of imitation:



The aforementioned criterion of the risk of confusion in the public mind applies also to the imitation of the emblem’s designations. Consequently, ‘bed cross’ or ‘rex crystal’, for instance, would be imitations of the emblem’s designation, prohibited by IHL.

In principle, the intention of the person using the emblem improperly or using an imitation thereof must not be taken into account: improper use of the emblem and imitation thereof is illegal.

However, in case of doubt as to whether a mark constitutes an imitation or not, an attempt may be made to determine whether the person had any actual intention of deceiving the public or exploiting the prestige of the emblem. In light of the Commentary on GC I (Article 53), the test should be interpreted in the manner most favorable to the GC and the emblems:

“If the user means no harm, why should he choose a mark resembling the red cross [or the red crescent or the red crystal]? There can be no valid objection to substituting an entirely different symbol.”

This means that if there might be a reasonable doubt that a mark or sign could be mistaken for the emblem, it must be considered as an imitation and must therefore not be registered as a trademark or used in any other way.

Lastly, it is worth underlining that entities or persons authorized to use the emblem under specific conditions may not use an imitation thereof when such conditions for use of the emblem are not fulfilled.”

⁵ At page 312 and available at <https://shop.icrc.org/etude-sur-l-usage-des-emblemes-problemes-operationnels-et-commerciaux-et-autres-problemes-non-operationnels-2448.html>

25. This is written in the context, of course, of the prospects and success of criminal prosecutions under the GC Act, as a result of use of a particular sign, rather than the refusal to register such a sign as a trade mark. That said, it leaves me in no doubt that in principle, a background to the red cross emblem in a colour other than white, will not save a sign, in the eyes of the ICRC at least, from being a prohibited imitation of the red cross emblem. The background colour here, in the first mark, is grey. In my opinion, a background such as that in the first mark is eminently capable of being within the parameters of what may be considered to be an imitation of the red cross. I would add, simply, that the shade selected for the background does nothing in my opinion to mask or alter the shade of red used for the cross device. The red colour still very much stands out against its background.

Discrete elements?

26. At this point I would like to consider the question whether the registrar is obliged to consider the matter *within the overall context of the mark as a whole*, including of course the word 'turmeric'. It may further raise the question as to whose perception must be taken into account for that purpose, the relevant consumer or someone else? I am not aware of any binding (or any) authority on this important question.

27. In my opinion, the answer to the above question is that the registrar is not *obliged* to consider the mark as a whole and may consider the offending element, assuming it is an element, as in this case, as a discrete and detachable entity. It is not necessarily inevitable that notions or concepts, familiar in trade mark law, such as 'considering the mark as a whole' must be applied in a case such as this, which involves a protected emblem. It is my primary position that the protection afforded the red cross emblem and imitations was intended to be absolute, in the sense that it is regardless of context in terms of any other design, of which it may be a part or with which it is used in conjunction. Further, it is absolute, regardless of the use being made of it, that is, whether commercial or, for example, humanitarian. Finally, and notwithstanding my observation in the hearing report concerning pharmaceutical goods, it is absolute, regardless of the goods or services upon which it may be used. The latter 'absolute' protection would mean that, whilst appropriate and authorised use of the red cross emblem may be associated with the field especially of medical goods or services, as a matter of law, no such distinction is made and use is capable of prevention in relation to any goods or services. It may be such contextual matters as I have mentioned may lead to a reinforcing of the view one may take of the offending elements in isolation but I am not obliged to take such factors into account.

Findings based on the red cross emblems being discrete elements

26. Taken in isolation, as discrete (and proportionately very visible) elements of both marks, I make a finding that, as regards the first mark, the 'offending element' would fall foul of section 6(2)(b) of the GC Act and, as regards the second mark, the 'offending element' would fall foul of section 6(1). That assumes, of course, the elements are considered discretely.

27. As regards this finding, I remind myself that all that is required under section 6(1) is that the emblem is a 'red cross with vertical and horizontal arms of the same length

on, and completely surrounded by, a white ground' and that under section 6(2)(b), that the emblem is 'capable of being mistaken for, or, as the case may be, understood as referring to' the red cross emblem. As we have seen already, neither international law nor national law actually prescribe or define the precise dimensions of the colour of the red, or indeed the particular dimensions of the arms of the cross itself. It may be true that most people may conceive of the red cross emblem as comprising 5 equal red squares but plainly, in law, the red cross emblem does not have to be that configuration as its exact form, in the UK at least, is not fixed.

28. However, for the sake of completeness, I wish in this decision to consider both the question of context of the marks as a whole and the possibility, at least hinted at by the applicant that, within its context, the offending elements may not be considered to be red cross emblems at all, but instead, mathematical 'plus' symbols.

The question of context

29. Lest I am wrong on the finding above, (in other words, that I am required to take contextual circumstances into account, such as considering the marks as a whole, as well as the goods and services in relation to which trade mark application is made), I will also proceed to consider the matter having regard to contextual matters, which includes the possibility, hinted at by the applicant, that the offending emblem, would not even be seen as a red cross at all but a mathematical 'plus' symbol instead.

The marks as a whole and the question whether the emblem is a 'plus' symbol rather than a red cross

30. Considering the wider context then, no doubt the question of a design being a red cross emblem or an imitation within the terms of the GC Act, is especially acute where the goods and services are medical, or could loosely be associated with the medical field. In this case, for example, the whole of both marks includes the word 'turmeric' and the goods are in Class 5 and all such goods, in my opinion and albeit perhaps loosely, may be said to have potential for medicinal or, at least, physically beneficial properties. I think I can take on judicial notice that turmeric is a well-known spice whose possible therapeutic qualities have, perhaps recently, come into sharp focus. The very fact that goods of the specification include, typically, products that would be sold in health stores or pharmacies would further suggest to the consumer that a product bearing the marks would be intended for, or possibly have as an effect, beneficial, medicinal or even curative properties. In my opinion, such contextual factors would make any likelihood that the red cross element would fall within the scope of the GC Act that much more likely and, of course, be accordingly prohibited.

31. A further factor in my tentative conclusion above is that the emblem is positioned after the word 'turmeric', *and on its own*. If it were to be clearly perceived as, instead, a mathematical 'plus' sign, the inevitable question would be, 'what exactly is being added to what', in other words, 'turmeric' 'plus' what, exactly?

32. An alternative view may be to say that the 'plus' sign perhaps indicates some form of extra strength turmeric. This was not, however, an argument which was put in any detail by the attorneys at the hearing. In short, no persuasive submission has been made, or evidence provided, that convince me that, instead of a red cross emblem,

there is any possibility, let alone probability, that the offending emblem would be seen by the relevant consumer (assuming it to be a 'relevant consumer' test) as a mathematical 'plus' sign. Had the applicant wanted to make such an argument, it could, for example, have provided evidence to the effect that, as an industry norm or pattern recognised by consumers, such emblems invariably represented extra strength formulations to the consumer. Furthermore, if the applicant's position was that it is not a relevant consumer test at all and that, for example, factors such as its own intention should have been taken into account, then likewise, I would have expected full submissions and evidence along those lines. As it is, I can only make an assessment based on what is before me.

33. I should also point out that section 6(2)(b) of the GC Act, prevents the use of designs which are 'likely to be mistaken for' or 'understood as referring to' the red cross emblem itself. The first limb of this section seemingly relates to the potential for consumer confusion. The second limb seemingly invokes a potentially broader test, whereby the decision taker simply needs to be content that a particular design 'evokes' or 'brings to mind' the red cross emblem, without necessarily resulting in consumer 'confusion'. In this particular case, I would find, assuming and taking into account contextual matters, the emblem in both marks is likely to be mistaken for the red cross emblem. If I am wrong to conclude that there would be confusion ('likely to be mistaken for'), I would nonetheless find that the design in question would 'evoke' or 'bring to mind' the emblem of red cross ('understood as referring to'), especially in the context of the overall mark and the goods and services in relation to which it is proposed to be used.

Findings taking account context and whether the emblem is a 'plus' sign

34. For the reasons given above I am unable to conclude that the offending emblem in both marks would be considered to be a mathematical 'plus' symbol rather than a red cross emblem. **My findings are that, in the context of both marks as a whole and the nature of the goods specified, that the marks will fall foul of the terms of section 6(2)(b) of the GC Act.** ⁶

Objection raised under Section 3(1)(b)

35. As I have maintained the objection under Section 3(4) this effectively ends the matter. The attorneys specifically asked that the hearing be held in respect of the objection raised under Section 3(4) only and therefore no submissions have been put before me in respect of the objection raised under Section 3(1)(b), nor has any evidence of acquired distinctiveness been submitted. In the circumstances and as I have said, I do not wish to say anything at this stage about section 3(1)(b) which may be perceived as prejudging any further matter, and instead, request that the matter be remitted to the registrar in the event that the ground of objection under section 3(4) is found, on appeal, to be invalidly raised.

⁶ I have not overlooked the possibility that, in fact, the marks may have been used for some time prior to filing. I recall the applicant has indicated its wish to rely, in the event matters get to that stage, on a plea of acquired distinctiveness. The fact of such use and its possible impact on the questions before me has not, however, been specifically addressed by the applicant. It is not a factor then which I can take into account.

Conclusion

36. In this decision I have considered all documents filed by the applicant and all arguments submitted to me in relation to this application. Having done so, and for the reasons given above, the application is refused because its use would be prohibited by law under section 6(1) or 6(2)(b) of the Geneva Conventions Act 1957 and thus is barred from registration under section 3(4) of the Trade Marks Act 1994.

Dated this 04th day of July 2018

**Linda Smith
For the Registrar
The Comptroller-General**