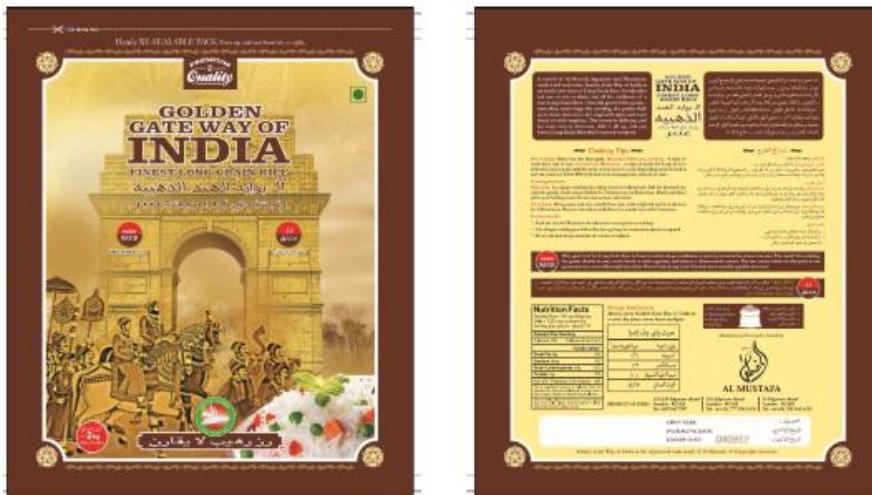


O-497-18

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3196548
BY ANGLO ARABIAN FOODS LTD
TO REGISTER THE TRADE MARK**

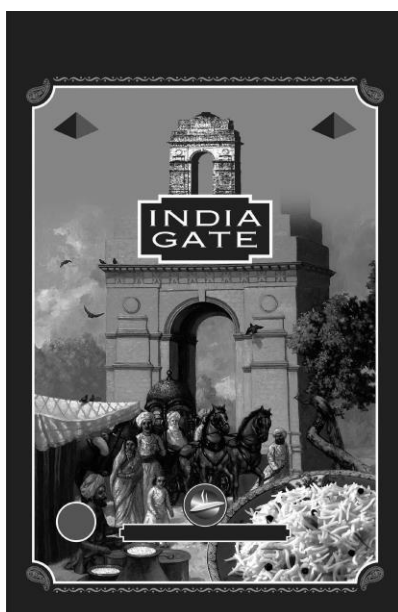


**IN CLASS 30
AND
IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 408601 BY KRBL LIMITED**

BACKGROUND

1. On 14 November 2016 Anglo Arabian Foods Ltd (“the applicant”) applied to register the trade mark shown on the cover page of this decision for *rice* in class 30. The application was published for opposition purposes on 25 November 2016.

2. The application is opposed by KRBL Limited (“the opponent”). The opposition is based on Section 5(2)(b)¹ of the Trade Marks Act 1994 (“the Act”), for the purpose of which the opponent relies upon EU registration no. 11888955 for the mark shown below:



which has a filing date of 11 June 2013 and a registration date of 22 October 2013. The opponent relies upon all the services for which the mark is registered, namely *rice*; *rice products* in class 30.

3. The significance of the dates mentioned above is that (1) the opponent’s mark constitutes an earlier mark in accordance with section 6 of the Act, and (2) it is not subject to the proof of use conditions contained in section 6A of the Act, its registration procedure having been completed less than five years before the publication of the applied for mark.

¹ The opposition was initially based on other grounds, namely, Sections 5(3), 5(4)(a), 3(6) and 56; however, no evidence was filed by the opponent to support these grounds and they were subsequently struck out.

4. The opponent claims that the marks are remarkably similar and the goods are identical.

5. The applicant filed a counterstatement in which it denies the grounds of opposition.

6. On 22 March 2018 the Registry received correspondence on behalf of the parties about a possible settlement agreement. Having heard nothing further about the settlement, on 26 June 2018 the Registry sent the parties an official letter requesting an update and stating that if no response was received by 10 July 2018, the case would proceed to a decision. No response has been received to date and the case has been passed to me for decision.

7. In these proceedings, the opponent is represented by Azrights Solicitors; the applicant represents itself. Neither party filed evidence or written submissions during the course of the evidence rounds. Neither party asked to be heard and neither party filed written submission in lieu of attendance at a hearing. This decision is taken following a careful reading of all of the papers.

DECISION

8. Section 5(2)(b) of the Act reads:

“5(2) A trade mark shall not be registered if because –

(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.”

9. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

- (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 be dominated by one or more of its components;
- (f) however, it is also 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 greater 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 creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

10. In comparing the respective specifications, all the relevant factors should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the Court stated at paragraph 23:

“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 intended purpose and their method of use and whether they are in competition with each other or are complementary”.

11. The parties' goods are:

Applicant's goods	Opponent's goods
Class 30: Rice	Class 30: Rice; Rice products

12. The goods are self-evidently identical.

The average consumer and the nature of the purchasing act

13. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue; I must then determine the manner in which these goods will be selected in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

14. The average consumer is a member of the general public who is likely to purchase the low-cost goods at issue on a fairly regular basis. As such goods will, typically, be self-selected from the shelves of a retail outlet such as a supermarket or from the pages of a website, so visual considerations will dominate the selection process. Although I do not discount aural considerations, they will, in my view, be a much less significant feature of the process. Given the low cost of the goods and the likely frequency of purchase, I would expect the average consumer to pay a lower than normal degree of attention during the selection process.

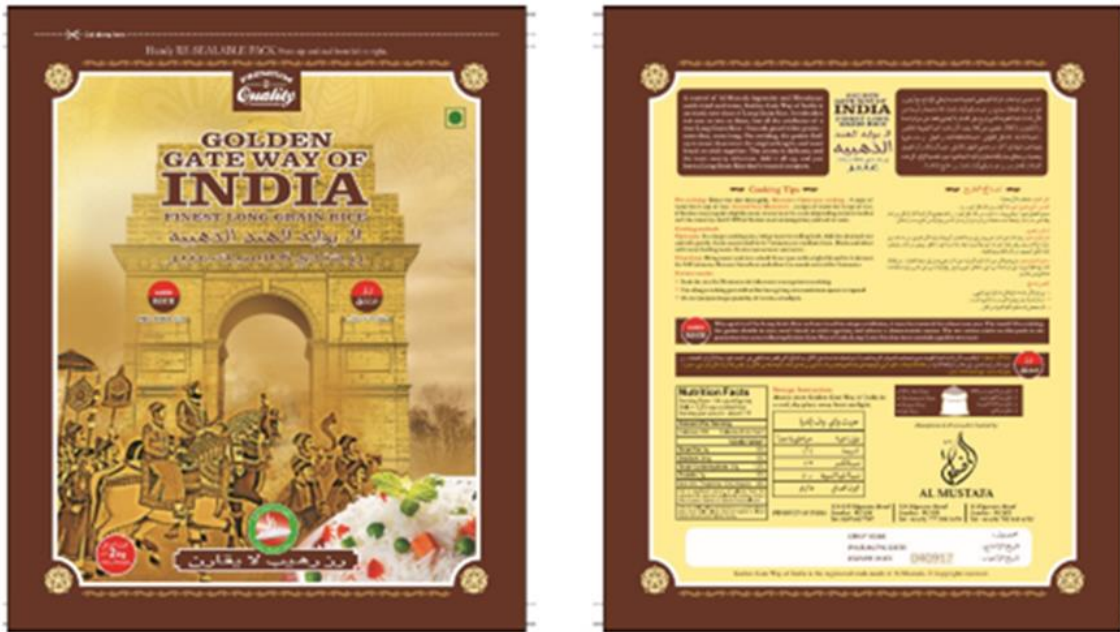
Comparison of marks

15. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

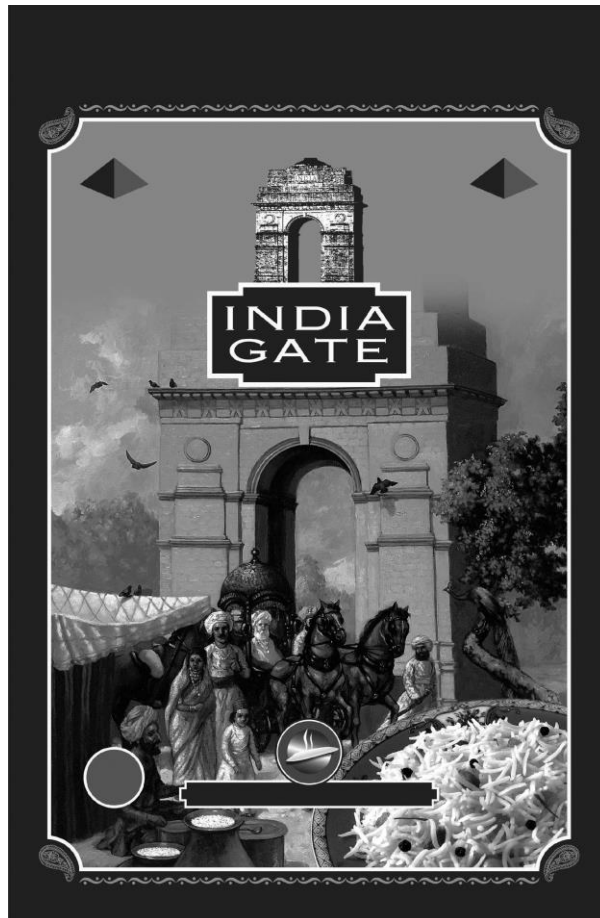
“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

16. It would be wrong therefore artificially to dissect the marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features, (which are not negligible) and therefore contribute to the overall impressions created by them. The marks to be compared are:

Application



Earlier mark



Overall impression

17. The earlier mark consists of a number of elements. There are the words “INDIA” and “GATE”, presented in capital letters in a white standard typeface, placed one above the other and framed within a black rectangular background with indented corners and a white border. This element is placed above the cornice of a large monumental arch with one arched passageway; placed above it, is another arch, but much smaller. The two piers of the main arch present some decorative elements: each has a circle at the top and two raised vertical edges (which give a three-dimensional effect and the impression of a column) with two horizontal lines running across. In front of the arch, is a representation of a busy scene showing a number of individuals wearing turbans and two horses pulling a carriage. On the left side of the scene there is some vegetation. The arches and the scene are depicted in a naturalistic way, in shades of grey, which gives the impression of a black and white reproduction of a painting. Superimposed in the bottom right-hand corner is a photographic image of a rice dish containing (what looks like) peas. There are also other elements. There are two grey trapezoid devices in the top corners. There is a grey circle outlined in white in the bottom left. There is a grey cylindrical shape, also outlined in white, with indented corners, laid horizontally at the bottom of the mark, the last half of which is placed over the rice dish. And, finally, there is a second grey circle, outlined in white, placed above the centre of the cylindrical shape: it incorporates what looks like a steaming rice grain, with a beam of light on the background. All of this is framed within a black rectangular with decorative swirls and dots running along the top and the bottom, and four decorative curly leaves placed within the indented round corners.

18. In terms of overall impression, the words INDIA GATE forms a unit and have an independent distinctive role in the mark. Though it occupies a relatively small area of the mark, there is a tendency for words to speak louder than devices. Further, given their position in the central-upper part of the mark, the words INDIA GATE are visually prominent. In my view, looking at the mark as a whole, both the words INDIA GATE and the realistic scene will make a roughly equal contribution to the overall impression. As to the other graphic elements of the mark, though the picture of a rice dish is visually prominent, is likely to be seen as decorative and will carry less weight. The decorative

shapes, the circle device containing a rice grain and the borders are also ornamental in nature, but will not be completely unnoticed.

19. Turning to the applied for mark, this consists of two rectangular packaging sections shown on a front and reverse side. The front side is made up of a number of elements. It contains, at its top, the word "GOLDEN", "GATE WAY OF" and "INDIA" in capital letters; the word GOLDEN appears above the words GATEWAY OF and (though still perfectly prominent) in letters smaller than the following line, INDIA. Below the word INDIA are the words FINEST LONG GRAIN RICE, in capital letters; due to their small size they can just about be made out. Beneath these verbal elements a number of characters, in what looks like an Arabic script, appear in a straight line. All of these verbal elements are presented in a brown colour with a white outline and are superimposed on the attic of a monumental arch (presented in sepia), which has one arched passageway. The two piers of the arch present some decorative elements: each has a circle at the top and two raised vertical edges (which give a three-dimensional effect and the impression of a column) with two horizontal lines running across; the circles are in red (top half) and brown (top bottom). The circle on the left incorporates the words "Aged Rice" in white, the one on the right contains (what looks like) Arabic characters (also in white), however, due to their size these verbal elements are hardly legible. In the foreground, in front of the arch, is a realistic scene (also in sepia); the scene depicts a number of individuals wearing traditional clothes, two of which are riding horses, engaged in a sort of procession. There is also some vegetation on the left hand-side of the scene. Superimposed in the bottom right-hand corner is a photographic image of a rice dish, containing peas and other vegetables. There are also other elements. There is a red circle outlined in white in the bottom left with the words 2 Kg (in white) and (what looks like) Arabic characters. There is a brown cylindrical shape, also outlined in white, with indented corners laid horizontally at the bottom of the mark, the last half of which is placed over the rice dish; this element also contains (what looks like) Arabic characters. And, finally, there is a second circle with a green border, placed above the centre of the cylindrical shape: it contains a steaming rice grain with a beam of light on the background. All of this is framed within a brown rectangular with decorative swirls running along the top and the bottom, and four decorative circles placed within the indented round corners. At the top of the mark (outside the frame) there are the words Handy Resealable Pack and a small

rectangular shape in brown containing the words Premium (which is slightly bowed) Quality.

20. The second section of the applied for mark contains packaging information (most of which are illegible) and the words GOLDEN GATE WAY OF INDIA positioned in the central-upper part. It is presented in sepia, brown and red colours.

21. In terms of overall impression, whilst the second section is not negligible, the first section is clearly the dominant and distinctive part of the mark. The words GOLDEN GATE WAY OF INDIA forms a unit and have an independent distinctive role in the mark. The mark's distinctive weight lies heavily on the words GOLDEN GATE WAY OF INDIA and on the depiction of the realistic scene; these two elements together dominate the mark. The words "Premium Quality", "Finest Long Grain Rice", "aged Rice" and "2 Kg" are completely descriptive and carry little or no weight in the overall impression. The photographic image of a rice dish, though visually prominent, will carry less weight. The decorative shapes, the circular device containing the rice grain and the borders are also ornamental in nature, but will not be completely ignored.

Visual similarity

22. Visually, there are some obvious and strong similarities between the marks. Both marks are set out in a very similar fashion. The rectangular frames with intended round corners and the decorative elements are highly similar features of the marks. Both marks contain a highly similar image of a rice dish positioned in the same right-hand corner. Both marks incorporate two identical circular devices (one of which contains the identical representation of a steaming rice grain with a beaming light on the background) and a highly similar cylindrical shape in exactly the same position. And, most importantly, the marks share two similar images of a realistic scene unfolding in front of a monumental arch with highly similar architectural features. Whilst, admittedly, the scenes are not identical, they both represent individuals dressed in traditional clothes and engaged in some activities and horses. The differences between the marks include, on the other hand, the colours as well as the information section of the packaging in the application. However, as the earlier mark is registered in monochrome it could be presented in the same shades of sepia used in the

application, which would reduce the impact of the colour in the comparison between the marks. As for the information section of the packaging, though consumers might read it, it will not have the same impact of the front section. There are other differences, including the presence of an additional small arch on the top of the main monumental arch however, this does not detract from the similarities I have identified. In relation to the verbal elements of the marks, the dominant and distinctive components GATE INDIA and GOLDEN GATE WAY OF INDIA are both units including the identical words GATE and INDIA; though the applied for mark is longer, they still share a good deal of similarity. In my view the marks are visually similar to, at least, medium to high degree.

Aural similarity

23. In term of aural similarity, the earlier mark will be pronounced as INDIA GATE. The application is likely to be spoken by reference to GOLDEN GATE WAY OF INDIA, as the average consumer is unlikely to articulate descriptive elements and/or the information on the packaging. The marks are similar to a low to medium degree.

Conceptual similarity

24. The applicant states that:

“The words GOLDEN GATEWAY OF INDIA refer to the "Gateway of India" stone gateway which is situated on Apollo Bandar, Mumbai. The India Gate referred to and depicted in the Claimant's Trade Marks is situated on Rajpath, New Delhi.

It is in any event denied that the words GOLDEN GATEWAY OF INDIA are similar to the words INDIA GATE.”

25. There is no evidence that the two monuments to which the opponent refers are famous monuments or that their names are well known in the UK. In any event the monuments depicted on the marks look the same. Even if I were to accept that a small part of the UK public will recognize one of the names or both names as names of monuments (which I do not), most people will not. In my view, most average

consumers in the UK will not understand GOLDEN GATEWAY OF INDIA and INDIA GATE as the names of the monuments represented in the marks, but as the brand name. In terms of conceptual similarity, both GOLDEN GATEWAY OF INDIA and INDIA GATE convey the same concept of an Indian gate or gateway, which are both words used to indicate an entry and/or an opening; this concept is reinforced in both marks by the depiction of a passageway. Whilst the word GOLDEN qualifies the word GATE WAY, it refers to a colour and does not introduce a significant conceptual difference. Both marks also contain a realistic scene unfolding in front of the monumental arch and involving people dressed in traditional clothes and horses, which will also convey a highly similar concept. The fact that both marks incorporate both the picture of a steaming grain of rice with a beaming light on the background and an example of how the goods could be served, also add to the conceptual similarity. In my view the marks are conceptually similar to a very high degree.

Distinctive character of earlier mark

26. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*²⁶, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as

originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

27. The opponent has filed no evidence to support a claim of enhanced distinctive character. Therefore, I have only the inherent position to consider. The earlier mark is a complex figurative mark incorporating the words INDIA GATE, a realistic scene and other graphic elements. Though India is a well-known producer of rice, INDIA GATE has no direct meaning in connection to the goods concerned. The realistic scene also adds to the distinctiveness of the mark. As to the decorative elements, whilst taken separately, are not very strong elements, their combination is distinctive. In my view, the mark as a whole, has a high degree of distinctive character.

Likelihood of confusion

28. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods and vice versa. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has retained in his mind.

29. There are two types of relevant confusion to consider: direct confusion (where one mark is mistaken for the other) and indirect confusion (where the respective similarities lead the consumer to believe that the respective goods and services come from the same or a related trade source). This distinction was summed up by Mr Iain Purvis Q.C. sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it

is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

30. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

31. The applicant states that it has registered the words GOLDEN GATEWAY OF INDIA and that on that basis there cannot be similarity and or infringement. The fact that the applicant might have some right in the words GOLDEN GATEWAY OF INDIA is not relevant in these proceedings².

32. Earlier in my decision I found that the goods are identical. The average consumer is likely to select the goods by the eye with a less than normal degree of attention, which increase the risk of imperfect recollection. The marks are visually similar to a medium to high degree, aurally similar to a low to medium degree and conceptually similar to a very high degree. The earlier mark is highly distinctive. The marks have clearly striking features in common and although some of the similarities I have identified are created by descriptive elements, the combination of these elements is distinctive. Even if consumers will notice the differences between the marks, they are unlikely to put the similarities down to coincidence. More likely than not, given the identity of the goods concerned, they will see the later mark as a new packaging

² See TPN 4/2009

coming from the same, or economically related, undertaking. **There is a likelihood of indirect confusion.**

Conclusion

33. The opposition succeeds and subject to appeal, the application will be refused.

Costs

34. The opponent has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by Tribunal Practice Notice (TPN) 2/2016. Using that TPN as a guide, I award costs to the registered proprietor on the following basis:

Official fees:	£100
Preparing a statement and considering the other side's statement:	£200
Total:	£300

35. I order Anglo Arabian Foods Ltd to pay KRBL Limited the sum of £300 as a contribution towards its costs. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated this day 10th of August 2018

Teresa Perks

For the Registrar

The Comptroller – General