

O-575-21

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3444263
IN THE NAME OF MALKA FOODS LIMITED
TO REGISTER AS A SERIES OF TWO TRADE MARKS:**



AND



FOR GOODS IN CLASSES 29 AND 30

AND

**IN THE MATTER OF THE OPPOSITION THERETO UNDER NO. 419526
BY ARCADIA FOOD INDUSTRIES LTD**

BACKGROUND AND PLEADINGS


1. On 14 November 2019 an application was filed to register as a series of two UK trade marks the figurative trade marks shown on the cover page of this decision. That application was published for opposition purposes on 6 December 2019 in respect of the following goods:

Class 29: *Pulses; Fried Onion; Dried Fruit; Preserved, dried and cooked fruits and vegetables; edible oils and fats; potato chips; nuts and mixtures of nuts and dried fruits; extracts of fruit and/or vegetables; fruit preserves, vegetable preserves; vegetable oils and fats; pickles; savoury snack foods; pulses; assorted nuts and processed nuts. Savoury snack foods; Meat, fish, poultry and game; meat extracts; jellies, jams; eggs, milk and milk products; frozen vegetables, potato and fruit products; potato crisps; potato chips; nuts and mixtures of nuts and dried fruits; sea foods; meat products; extracts of fruit and/or vegetables; dairy products; yoghurt; vegetable oils and fats; nut butter; soups; fruit snack bars; snack foods; dips.*

Class 30: *Plain Spices; Mixed Spices; Salt; instant meals; prepared meals; desserts and preparations for making desserts; food spreads; preparations made from flour; preparations made from cereals; not including breakfast cereal bars and cereal based snack bars; preparations made from farinaceous substances; chutneys; sauces; preparations for making desserts in the form of mixes of flour, spices and sugar for Asian sweets; popcorn; coated nuts; sugar; flour; breakfast cereals, not including breakfast cereal bars and cereal based snack bars; pizzas; pasta and pasta products; bread; pastries; pastry; spices; grains; rice; baking powder; none containing chocolate or chocolate flavouring.*

2. The application was originally filed in the name of Malka Foods (Private) Limited, a company incorporated in Pakistan, but on 28 August 2020 was assigned to Malka Foods Ltd, who for the purposes of this decision is “**the Applicant**”. The change of ownership of the Applicant’s trade mark was confirmed by this Office by way of a letter dated 21 October 2020.
3. On 21 February 2020, a notice of opposition, directed against the whole of the contested application, was filed on behalf of Arcadia Food Industries Limited (“**the Opponent**”).

Registration is opposed on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“**the Act**”), where the claim is that the Opponent has earlier trade marks which are similar or identical to the contested trade mark(s), that the parties’ respective goods are identical or “highly” similar, such that there would be a likelihood of confusion, including a likelihood of association. The Opponent relies on following two earlier-filed UK trade marks:

The Opponent’s earlier UK trade marks
<p>UK trade mark: 2440082: “MALKA” (“the Opponent’s Word Mark”)</p> <p>Filing date: 30 November 2006 Registered: 2 May 2008 for goods in Classes 29, 30 and 31</p>
<p>UK trade mark: 2466450 (a series of two) (“the Opponent’s Figurative Marks”)</p> <div style="display: flex; justify-content: center; align-items: center;">  and  </div> <p>Filing date: 11 September 2007 Registered: 4 April 2008 for goods in Classes 29, 30 and 31</p>

4. The filing dates of the Opponent’s Word and Figurative Marks predate that of the Applicant’s trade mark (series), so each of the Opponent’s marks therefore qualifies as an “earlier trade mark” under section 6(1)(a) of the Act. Since the Opponent’s earlier marks had been registered for over five years when the Applicant filed the contested trade mark application, they are subject to the use provisions of section 6A of the Act.

5. The Form TM7 Notice of Opposition indicated (in response to question 1 under Section A of the form) that *all* of the goods covered by the earlier marks were relied on for the

opposition. The earlier marks cover goods in Classes 29, 30 and 31.¹ The statement of grounds included a table putting side-by-side, for comparison purposes, the applied-for goods and those specified under the earlier registrations. However, the Opponent also stated its Form TM7 that each of its earlier trade marks had been used, in the five-year period ending on the date of application of the opposed mark, in relation to “*Flour*” (only). “*Flour*” is amongst the goods specified under both of the earlier marks in Class 30. Under the provisions of the Act, the Opponent is able to rely on its earlier registrations only to the extent that it is able to satisfy the proof of use requirements. Since it has claimed use only in respect of “*Flour*”, it follows that despite the responses at Section A, question 1 of the Form TM7, the Opponent is *not able* to rely on all of its goods in Classes 29, 30 and 31 covered by the earlier marks. The Opponent must necessarily be constrained to rely only on the goods in respect of which it has claimed to have used its trade marks during “**the relevant period**” (which is the five-year period ending on the filing date of the contested application).

The Applicant's defence

6. The Applicant filed a notice of defence and counterstatement denying the grounds claimed. The Applicant put the Opponent to strict proof of use of both of its earlier marks in respect of the goods relied on – *flour*. The counterstatement argued that the opposition should be dismissed in relation to any goods of the Opponent's mark for which evidence of use is not provided.
7. The counterstatement admitted that the Applicant's mark specifies “flour”, which is an identical term to the goods claimed by the Opponent, but beyond that one term, the counterstatement denied that any of the other goods applied for are similar or identical to flour, and put the Opponent to proof of such.
8. The counterstatement stated that the Opponent's marks comprise the word “MALKA” which is a descriptive term for food ingredients in India, and claimed that the word would therefore be regarded as being low in distinctive character, or of no distinctive character for Indian food ingredients. The counterstatement argued that the marks are therefore

¹ The goods specified under the earlier marks are set out in an annex at the end of this decision.

dissimilar, and that on the basis of a global appreciation of the marks and the goods denied that there was no likelihood of confusion.

9. On 3 November 2020, the Applicant's representatives confirmed: (i) that the Applicant has had sight of the forms and evidence filed to date in these proceedings, (ii) stands by the statements made in the counterstatement and confirms that where the name of the original applicant appears, this should be read as though it is made in the Applicant's name; and (iii) is aware of, and accepts liability for costs for the whole proceedings in the event that the opposition were successful.

Representation and papers filed

10. Urquhart-Dykes & Lord acts for the Opponent in these proceedings; IP-Active.com Ltd for the Applicant. During the evidence rounds, both parties filed evidence in chief. Neither evidence nor submissions in reply were filed. At the request of the Opponent an oral hearing was arranged, which took place before me by video conference on 12 May 2021, and where the parties were represented by Alan Fiddes (of Urquhart-Dykes & Lord) and by Timothy Blower of IP-Active.com Ltd. Skeleton arguments were filed in advance of the hearing.²

APPLICABLE LEGISLATIVE PROVISIONS

11. The substantive claim is based on section 5(2)(b) of the Act, reads as follows:
"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".
12. As I indicated in the background section, the earlier marks relied on by the Opponent are the use provisions set out in section 6A of the Act, which at the time that the opposition was filed read as follows:

² It is noted that the Opponent's skeleton argument duly pursued reliance only on flour.

Raising of relative grounds in opposition proceedings in case of non-use

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

- (a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and
- (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) [...]

(5A) [...]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

13. The first matter to be resolved therefore is whether the Opponent has established in its filed evidence that the earlier marks have been put to genuine use in the United Kingdom during the relevant period, which in this case is **15 November 2014 – 14 November 2019**.

Case law on genuine use

14. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 *P Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

- (2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].
- (3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].
- (4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].
- (5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].
- (6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the

purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no de minimis rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

15. In making my determination as to whether the evidence presented shows the necessary genuine use, I also take account of judicial comment as to probative and evidential issues in such cases. In *Awareness Limited v Plymouth City Council*³, Daniel Alexander QC sitting as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use [...]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor

3 Case BL O/230/13

is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

16. In *Dosenbach-Ochsner*⁴, Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person stated that:

“22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

Consideration of the evidence of use in this case

17. The **Opponent’s evidence** comprised a **witness statement of Amjid Baig**, dated 3 December 2020, with four exhibits. The **Applicant’s evidence** comprised a **witness statement of Mohsin Ayub**, director of the Applicant, dated 4 March 2021, with exhibits MA1 - MA7.

18. Mr Baig is a director of the Opponent company and his evidence comes from his own knowledge and from the company records, to which he has full access. I note the following points from the evidence:

- (i) Mr Baig states that the Opponent has manufactured and supplied flour, spice and pulse products under the brand MALKA since at least 2006.
- (ii) Mr Baig states that the Opponent’s goods are widely available throughout the UK “*through retail shops, wholesale cash and carries / distributors and food manufacturers*” which the Opponent supplies directly. It is not clear whether this reference to wide availability is intended to include goods sold under the MALKA

⁴ *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13

brand, since the Opponent also supplies its products under a number of brands, such as FAMOS, AARTI and FAMOS DRAGON.

- (iii) Mr Baig refers to the Opponent having “*always relied on the reputation it is established in the markets in which it operates*”. Mr Baig asserts that it is “*surprising that the Applicant who intends to operate in the same product market ... was not aware of our products before they decided to commence use of the identical name on or in relation to similar goods as can be seen from their packaging [at **Exhibit 1**]....*” (my underlining). Mr Baig concludes that “*this was intended to take advantage of the goodwill and reputation*” that the Opponent has established under the trade mark MALKA. **Exhibit 1** to Mr Baig’s statement shows the applied-for MALKA mark used on a packet labelled:



On these points from Mr Baig’s evidence I make the following observations (in no particular order):

- a. I note that the product at Exhibit 1 is shown to be “*processed and packed by “Malka Foods (Private) Limited”, which is the Pakistan-based company that was the original Applicant, and in the circumstances it is not clear which shared market Mr Baig is referencing or the extent to which it is the UK (as opposed to the EU or elsewhere).*
- b. The opposition involves no claim other than the section 5(2)(b) ground and there is no claim of enhanced distinctiveness through use of the mark. There is no claim based on section 5(3) or section 5(4)(a) nor on section 3(6). Therefore, Mr Baig’s **references to reputation, goodwill or alleged awareness of the Opponent or its earlier marks have no relevance in this opposition.**

c. The Applicant has applied for a UK trade mark registration in respect of specified goods. Whether it may be prevented from securing that registration falls to be determined based on an assessment of the similarity of the respective signs and between the goods specified in the application and any claimed earlier goods on which the Opponent is able to rely. Leaving aside the question of to what degree, if any at all, the evidenced seasoning/spice mix is similar to the goods “flour” relied on by the Opponent, the assessment task is in no way assisted by a photograph of a product bearing the mark applied for.

Exhibit 1 is of no relevance in this opposition.

(iv) **Exhibit 2** is stated to be a selection of photographs of “some of the products” that the Opponent supplies “under the trade mark MALKA and their packaging”. Two of those photographs are shown below.



Mr Baig’s evidence does not state where or when these photographs were taken. However, that question is answered by the Applicant’s evidence, which exhibits correspondence dated 18 February 2020 from the Opponent’s representatives,⁵ which

5 Exhibit MA7

includes the same photographs which are stated to have been “*taken recently in our client’s warehouse in the United Kingdom.*” The photographs of the goods are therefore from a couple of months after the relevant period. The bag shows the gram flour (given in various languages) to have been “made in the UK” but Mr Baig does not expressly state that the goods are packaged in the UK with the sign affixed as shown on the bag and boxes. The images show gram flour made in the UK, and packaged under the earlier mark, and could potentially contribute to the task of establishing genuine use, but **the shortcomings I have mentioned limit the evidential value of Exhibit 2.**

(v) Mr Baig refers to **Exhibit 3** as an extract from a third-party website showing that the products supplied by the Opponent “are available for sale in the United Kingdom” – my underlining of the present tense usage, and noting that the witness statement is dated 3 December 2020. The exhibit shows pages from ahmedbros.co.uk, which is shown (at the top of the first page of the exhibit) to be a wholesaler and distributor of packaging materials, food and soft drinks, with a Manchester contact address. It shows an image of a bag of gram flour bearing the earlier figurative mark and the image is accompanied by the text “MALKA GRAM FLOUR 20KG” and is shown to be “In Stock”. It gives no information as to sales or prices. **The content of Exhibit 3 is dated 4 December 2020 and so shows nothing as to the position during the relevant period.**

(vi) Moreover, the Applicant’s witness (Mr Ayub) states at paragraph 7 of his witness statement that before the Applicant adopted the applied-for mark, “*searches were undertaken for any use of the mark MALKA*” and that “*no hits were located, at that time (before filing in November 2019), of use in the UK for the relevant goods.*” The Applicant filed evidence based on a search using the Wayback Machine (the Internet Archive tool) in respect of the ahmedbros.co.uk website (the site referenced by the Opponent in its Exhibit 3). Mr Ayub states that the Wayback Machine evidence shows that “*up to 26 December 2018 at least, there was only placeholder information on this website and no mention of any products bearing the Opponent’s mark MALKA.*”⁶ I note that the relevant period extends to 14 November 2019, so it cannot be ruled out that MALKA goods were offered for sale on the ahmedbros

6 Exhibit MA6 pages 11-12

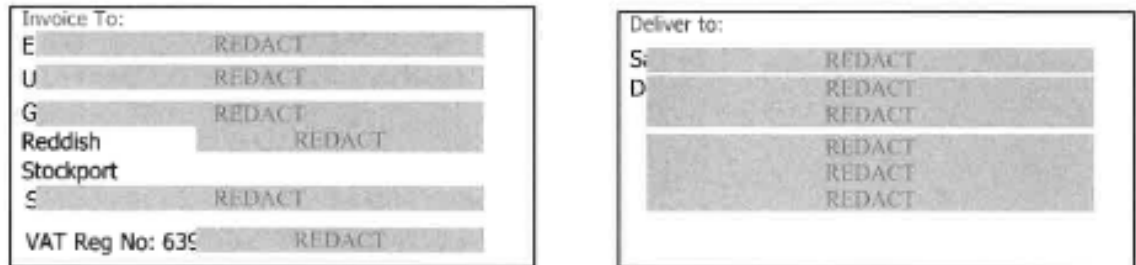
website in 2019, but I also note that **the Opponent filed no evidence in reply to show that to be the case, nor offered any other evidence of sales by other third parties.**

- (vii) The Applicant filed evidence showing the full content of the Opponent's website.⁷ The website states (page 3) *"In a Global Market full of wholesalers, traders, importers, exporters, with names and labels from around the world, we are Manufacturers of Flours, Spices and Wholefoods in the EC ... Arcadia Food Industries Ltd initially only manufactured Gram Flour (Chana Dahl Flour) from modest plant and beginnings. We are now the biggest importers of Chana Dahl and the biggest Millers of Gram Flour in the United Kingdom. Famos Gram Flour is considered to be the industry standard. We have expanded into the areas of Exotic Spices Whole and Ground and also in the processing, cleaning of Beans, Pulses, Lentils and Legumes. We are able to mill and blend Spices, Speciality Flours and source many food ingredients."* The website includes a list of products offered, which include spices, pulses and flours – however, the only brand of goods shown is FAMOS (e.g. FAMOS Gram Flour Superfine). There appears no mention at all of MALKA on the Opponent's website. I note that the Opponent offered no explanation for this total absence of reference to MALKA on its own website, whereas its FAMOS brand for the same product does feature. The Opponent gave no account at all of how it promotes its earlier MALKA marks or of how any consumer may become aware of the existence of its MALKA goods.
- (viii) The Opponent's evidence includes the following points relating to sales under the earlier MALKA marks. Mr Baig states at paragraph 8 that since the date of first use - which is at least 2006 – *"the total turnover generated as a result of sales under the trade mark MALKA has been £618,326.65. The total number of products which [the Opponent] has sold during this period bearing the MALKA trade mark has been over a quarter of a million units that represents over 800,000 kilogrammes of products sold under MALKA."* Mr Baig continues that *"Over the past few years the opponent has generated the following turnover from sales of its MALKA products*

2017	£118,103.65
2018	£57,841.15
2019	£61,091.40
2020	£121,166.10
Total	£385,202.30

- (ix) I note from the above paragraph that the stated total turnover of MALKA “products” in the 14 years between 2006 – December 2020 is around £618k and that around £385k of that was generated 2017 – 2020. Around £121k of turnover is attributable to 2020, which is outside the relevant period (15 November 2014 – 14 November 2019). It is also not clear how much of the 2019 turnover figure may have arisen after 14 November 2019. Nonetheless, at the very least, the figures in the table show that turnover, of “MALKA products” for the years 2017 – 2018, which are squarely in the relevant period, amounts to almost £176k (£175,944.80).
- (x) I note that the figures for total sales are very precisely identified; however, the repeated references to “products” are not precise. Mr Baig has stated that the Opponent has manufactured and supplied flour, spice and pulse products under the brand MALKA since 2006. It is not possible from Mr Baig’s statement to determine how much of the sales figures is attributable to the sale of *flour* i.e. the goods relied on. I also note that Mr Baig does not state the extent to which the turnover is attributable to UK custom. Whilst affixing a mark to goods for export is capable of amounting to genuine use, I have already noted, in relation to the packaged product shown in Exhibit 2, that Mr Baig does not state clearly the position as regards the bagging of the goods and where the mark is applied.
- (xi) **Exhibit 4** is stated to be “a selection of invoices issued by [the Opponent] which relate to sales of products under the trade mark MALKA.” Mr Baig states that he has redacted customers’ details and pricing details as the Opponent considers it “commercially sensitive”. Exhibit 4 presents 35 invoices from the Opponent, all of which include under the product description reference to Gram Flour MALKA (the Word Mark) in various amounts such as “6x2kg” or “400 x 25kg”. However, 17 of those 35 invoices (including one invoiced to Denmark) are not from within the

relevant period - only 18 fall within the relevant period. What can be said of this evidence is that it shows (i) invoices referring to the MALKA Gram flour and (ii) since the invoice addressees are not fully redacted, they are shown to relate to various towns across England, Scotland and Wales. For instance:



- (xii) However, the information in the delivery address box (as shown on the right above) is almost fully redacted such that it is not possible to know to which country the goods were sent (as opposed to invoiced). Although the delivery addresses are obliterated, to the extent that the delivery information is visible, in almost every case the delivery appears destined for someone or somewhere where the opening letters are “S” and “D”. This appears to suggest that the invoices are in respect of orders to a single, consistent delivery address/addressee - the position is simply not clear and it makes it problematic to infer any extent of custom.
- (xiii) Moreover, since the invoices have been systematically redacted to remove all pricing information (unit price, VAT amount and totals for any invoice) these invoices do not establish that customers have paid for MALKA gram flour at all. Since it cannot be determined on the basis of these invoices whether the goods relied on were provided at any charge at all, it cannot be ruled out for instance that the invoices may relate to promotional items as a reward for the purchase of other goods.

Conclusion on evidence of genuine use

19. The Applicant put the Opponent to strict proof of use. I have above given close consideration to the evidence marshalled by the Opponent in order to demonstrate that its use of its earlier marks, in respect of *flour*, during the relevant period, meets the requirements for genuine use (summarised in *Walton* as I set out earlier). I note that the Opponent has had the benefit of professional representation during these proceedings. I also have in mind the guidance from the *Dosenbach-Ochsner* and *Awareness* appeal

cases emphasising the need to consider what the evidence fails to “show”, and what might reasonably have been conclusively shown. In my analysis throughout paragraph 18 above, I have highlighted numerous shortcomings in the evidence, including the following:

- That despite the witness having full access to his own company records, and despite having furnished detailed information as to turnover, the witness evidence is vaguely expressed in important aspects and the exhibits are of limited, if any, evidential value.
- While I note the references to reasonably substantial turnover figures for “MALKA products”, there is no clear statement of turnover under the marks particularised in relation to *flour*, the only goods relied on. This is a particularly significant absence in my view and it is not appropriate for the tribunal to infer a notional figure attributable to the sale of gram flour. Almost half of the invoices at Exhibit 4 are from outside the relevant period and the degree of redaction applied to the invoices gives rise to significant questions that are not answered elsewhere in the evidence.
- Despite references to reputation and goodwill (neither of which is relevant as such) there is no corroborating third-party evidence of customers encountering the marks in use.
- There is no evidence of how the goods under the marks are promoted or offered for sale at all, and no reply during the evidence rounds to the point that the marks do not feature at all on the Opponent’s website. No response either to the Applicant’s evidence suggesting that the one third-party source cited (ahmedbros.co.uk at Exhibit 3), held up as offering the branded gram flour (albeit after the relevant date), did not appear to exist during the relevant period.
- There is no statement as to the affixing of the marks in the UK and no dated evidence to show use of the Opponent’s earlier Figurative Mark in the relevant period, such that Exhibit 2 is of very little evidential value. Exhibit 1 is entirely irrelevant.

20. While I am sensitive to the need to take the evidence in the round, I find that in view of the imprecision and inconsistencies that I have highlighted, the evidence is not sufficiently solid or specific to enable proper and fair evaluation of the scope of protection to which the Opponent is legitimately entitled, having regard to the interests of the Opponent, the Applicant and the UK consumer. The evidence simply does not establish, does not “show” that there has been a real commercial exploitation of the mark warranted in the economic

sector concerned to maintain or create a share in the UK market for “flour” – nor even for gram flour under the MALKA mark.

Outcome

21. Since I have found that the evidence filed is insufficient to establish genuine use of the earlier marks in the UK during the relevant period, the Opponent is unable to rely on any part of its registration as a basis to pursue its section 5(2)(b) objection. **Consequently, the opposition fails and the application is able to proceed to registration in its entirety.**

COSTS

22. The opposition having failed, the Applicant is entitled to a contribution towards its costs in defending the proceedings against it. I therefore make the following determination of costs in line with the scale published in the annex to Tribunal practice notice (2/2016).

Reviewing the statement of grounds and preparing the counterstatement:	£250
Preparing evidence and considering the other side's evidence	£600
Preparing for and attending the hearing	£650
Total	£1500

23. I order Arcadia Food Industries Limited to pay Malka Foods Ltd the sum of £1500 (one thousand five hundred pounds). This sum is to be paid within 21 days of the end of the period allowed for appeal or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings (subject to any order of the appellate tribunal).

Dated this 3rd day of August 2021

Matthew Williams

For the Registrar

Annex

The goods registered under the Opponent's Figurative Marks

Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams; eggs, milk and milk products; edible oils and fats; frozen foods; chilled foodstuffs; frozen vegetables, potato and fruit products; potato crisps; potato chips; instant meals; prepared meals; desserts and preparations for making desserts; nuts and mixtures of nuts and dried fruits; sea foods; meat products; extracts of fruit and/or vegetables; fruit preserves, vegetable preserves; dairy products; yoghurt; vegetable oils and fats; nut butter; pickles; food spreads; soups; fruit snack bars; snack foods; dips; pulses; assorted nuts and processed nuts.

Class 30: Frozen foods; chilled foodstuffs; prepared meals; instant meals; snack foods; preparations made from flour; preparations made from cereals; preparations made from farinaceous substances; preparations for making instant meals and instant snack foods; chutneys, sauces and ketchups; desserts; preparations for making desserts; popcorn; coated nuts; coffee, coffee essences and coffee extracts; mixtures of coffee and chicory; chicory and chicory mixtures, all for use for substitutes for coffee; tea; cocoa; preparations made principally of cocoa; chocolate; chocolate products; confectionery; candy; sugar; flour; breakfast cereals; pizzas; pasta and pasta products; bread; biscuits; pastries; cakes; pastry; ice, ice cream, water ices, frozen confections; preparations for making ice cream and/or water ices and/or frozen confections; honey; preparations consisting wholly or substantially wholly of sugar, for use as substitutes for honey; syrup, treacle, molasses; preparations for making sauces; spices; vinegars; custard powders; salad dressings; mousses; puddings; dips; grains; rice; baking powder.

Class 31: Fresh fruits; fresh vegetables; fresh nuts; fresh pulses; grains.

Registered goods under the Opponent's Word Mark

Class 29: Preserved, dried and cooked fruits and vegetables; edible oils and fats; potato chips; nuts and mixtures of nuts and dried fruits; extracts of fruit and/or vegetables; fruit preserves, vegetable preserves; vegetable oils and fats; pickles; savoury snack foods; pulses; assorted nuts and processed nuts.

Class 30: Savoury snack foods; preparations made from flour; preparations made from cereals; not including breakfast cereal bars and cereal based snack bars; preparations made from farinaceous substances; chutneys; sauces; preparations for making desserts in the form of mixes of flour, spices and sugar for Asian sweets; popcorn; coated nuts; sugar; flour; breakfast cereals, not including breakfast cereal bars and cereal based snack bars; pizzas; pasta and pasta products; bread; pastries; pastry; spices; grains; rice; baking powder; none containing chocolate or chocolate flavouring.

Class 31: Fresh fruits; fresh vegetables; fresh nuts; assorted nuts; pulses; grains.