BL O/0610/24

TRADE MARKS ACT 1994

IN THE MATTER OF

APPLICATION NO. 3851385

IN THE NAME OF HILLTOP IMPEX GMBH

TO REGISTER

AS A TRADE MARK IN CLASSES 30 and 35

AND

OPPOSITION THERETO (UNDER NO. 438353)

BY

ALTUNKAYA INSAAT NAKLIYAT GIDA TICARET ANONIM SIRKETI

Background and pleadings

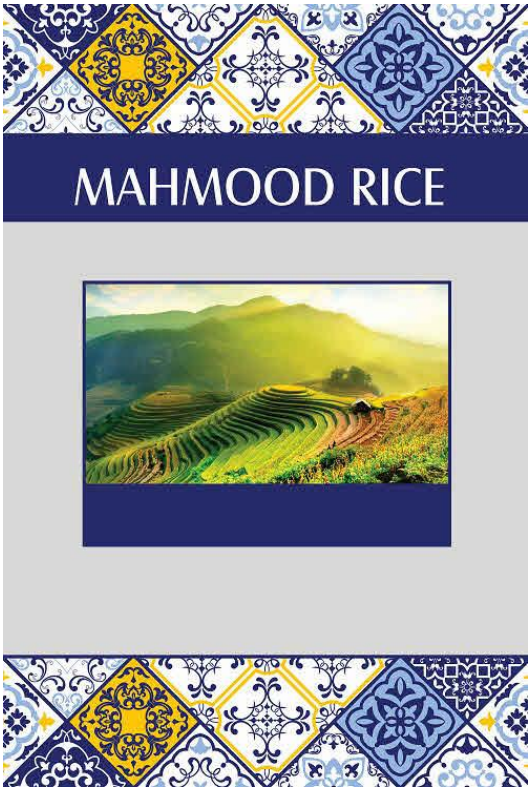
1. On 21 November 2022, Hilltop Impex GmbH ("***the Applicant***") applied to register in the UK the trade mark shown on the cover page of this decision, under number UK00003851385 ("***the Contested Mark***").

2. Details of the application were published for opposition purposes on 02 December 2022. Registration was initially sought for the following goods:

   Class 30: Cereals; Rice.

   Class 35: Retail or wholesale services connected with the sale of rice and cereals.

3. On 29 December 2022, Altunkaya Insaat Nakliyat Gida Ticaret Anonim Sirketi ("***the Opponent***") opposed the application under section 5(2)(b) of the Trade Marks Act 1994 (***"the Act"***). The Opponent relies upon its UK trade mark number UK00003602755 represented as follows ("***the Earlier Mark***"):



4. The Earlier Mark was filed on 01 March 2021 and became registered on 08 October 2021 in respect of the following goods:

Class 30: Coffee, cocoa; coffee or cocoa based beverages, chocolate based beverages; pasta, noodles; pastries and bakery products based on flour; desserts based on flour and chocolate; bread, desserts based on dough coated with syrup; puddings, custard; honey, propolis for food purposes; condiments for foodstuff, vanilla (flavoring), spices, sauces (condiments), tomato sauce; yeast, baking powder; flour, semolina, starch for food; sugar, cube sugar, powdered sugar; tea, iced tea; confectionery, chocolate, biscuits, crackers, wafers; chewing gums; ice-cream, edible ices; salt; cereal-based snack food, popcorn, crushed oats, corn chips, breakfast cereals, processed wheat for human consumption, crushed barley for human consumption, processed oats for human consumption, processed rye for human consumption, rice; molasses for food.

5. By virtue of its earlier filing date of 01 March 2021, that registration constitutes an earlier mark within the meaning of section 6 of the Act. As the Earlier Mark had not completed its registration process more than five years before the filing date of the application in issue, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the Opponent is entitled to rely upon all the goods identified, without having to demonstrate genuine use. For the purposes of the opposition, the Opponent relies upon all the goods for which the Earlier Mark is registered, as indicated above.

6. Although the Opponent was not required to show genuine use of the Earlier Mark, it submitted evidence of use. Whilst I do not have to assess genuine use of the Earlier Mark, I will assess it as it may support the Opponent's position showing that the Earlier Mark has enhanced its distinctive character through use.

7. Following the filing of the Opposition, the Applicant applied to limit the specification of the Contested Mark to the following:

Class 30: Basmati rice originating from India and/or Pakistan.

Class 35: Retail or wholesale services connected with the sale of Basmati rice originating from India and/or Pakistan.

8. On 24 March 2023 the Opponent informed the Tribunal of the intention to maintain the opposition notwithstanding the Applicant's limitation to the contested goods and services.

9. In its notice of opposition, the Opponent essentially contends that the competing marks are highly similar, and that the parties' goods are identical or highly similar, giving rise to a likelihood of confusion, including the likelihood of association.

10. Hilltop Impex GmbH filed a counterstatement, denying the ground of opposition.

Relevance of EU law

11. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Evidence and submissions

12. During the evidence rounds the Opponent filed a witness statement, dated 5 July 2023, from Izzettin Ozel with exhibits EXH1 – EXH4. The Applicant filed submissions dated 17 August 2023 and a witness statement from David Gill, dated 18 August 2023, with exhibits DG1 – DG5. The evidence and submissions will not be summarised here but will be referred to as and where appropriate during this decision. No hearing was requested and neither party filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

Decision

The law

13. Sections 5(2)(b) and 5A of the Act read 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."

"5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

Case law

14. The leading authorities which guide me are from the Court of Justice of the European Union ("CJEU"): *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.

The Principles

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other

components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may 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 great degree of similarity between the marks, and vice versa;

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

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

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks 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 and services

15. When making the comparison, all relevant factors relating to the goods and services in the specification should be taken into account. In *Canon*, the CJEU stated at paragraph 23 of its judgment:

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

16. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

> a) The respective users of the respective goods or services;
>
> b) The physical nature of the goods or acts of services;
>
> c) The respective trade channels through which the goods or services reach the market;
>
> d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
>
> e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

17. The General Court ("GC") confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

> "*29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/*00 Institut fur Lernsysteme v OHIM- Educational Services *(ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark*".

18. The competing goods and services are as follows:

Opponent's goods	Applicant's goods
Class 30	**Class 30**
Coffee, cocoa; coffee or cocoa based beverages, chocolate based beverages; pasta, noodles; pastries and bakery	Basmati rice originating from India and/or Pakistan.
	Class 35

products based on flour; desserts based on flour and chocolate; bread, desserts based on dough coated with syrup; puddings, custard; honey, propolis for food purposes; condiments for foodstuff, vanilla (flavoring), spices, sauces (condiments), tomato sauce; yeast, baking powder; flour, semolina, starch for food; sugar, cube sugar, powdered sugar; tea, iced tea; confectionery, chocolate, biscuits, crackers, wafers; chewing gums; ıce-cream, edible ices; salt; cereal-based snack food, popcorn, crushed oats, corn chips, breakfast cereals, processed wheat for human consumption, crushed barley for human consumption, processed oats for human consumption, processed rye for human consumption, rice; molasses for food.	Retail or wholesale services connected with the sale of Basmati rice originating from India and/or Pakistan.

19. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

Comparison between goods

'*Basmati rice originating from India and/or Pakistan*'

20. In its defence and counterstatement, the Applicant concedes that the respective goods are identical as it states that "*the Applicant accepts that the goods of the Mark Applied For, being basmati rice originating from India or Pakistan, are identical to 'rice' listed in this specification for the Earlier Mark*". The goods at issue are identical.

21. The Applicant continues arguing that "*the remaining goods in the specification of class 30 for which the Earlier Mark is registered are different to the goods and services of the Mark Applied For which are limited to basmati rice originating from India or Pakistan, and retail or wholesale services for such goods*".

22. To this regard, I note that the Opponent's 'rice' covers all the Applicant's goods in Class 30. Therefore, it is irrelevant that the contested goods differ from other goods in the Opponent's specification as the identity of the Applicant's goods with the Opponent's 'rice' sufficiently covers all the Applicant's goods.

Comparison between goods and services

'*Retail or wholesale services connected with the sale of Basmati rice originating from India and/or Pakistan*'

23. Regarding the similarity between the retail services of rice and the 'rice' goods in Class 30, as this assessment pertains to a comparison of retail services and goods, I remind myself of the case of *Oakley, Inc v OHIM*, Case T-116/06 wherein the GC, at paragraphs 46-57, held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

24. Additionally, in *El Corte Inglés, SA, v (EUIPO)*, Case T-729/18, the GC stated that:

> "*[…] it must be borne in mind that goods and services can be considered to be complementary where there is a close connection between them, in the sense that one is indispensable or important for the use of the other, with the result that consumers may think that the same undertaking is responsible for manufacturing those goods and for providing those services (see, to that effect, judgment of 16 October 2013, El Corte Inglés v OHIM — Sohawon (fRee YOUR STYLe.), T-282/12*".

25. Rice is a cheap everyday food product made for consumption that is sold by a wide variety of bricks-and-mortar and internet retailers, department stores and supermarkets. The Applicant's services would involve selecting and bringing rice goods together and services aimed at encouraging the consumer to buy the goods there, rather than from another retailer/wholesaler.

26. There is no similarity of nature or purpose between the respective goods and services. However, the users of the retail and wholesale services will be the same as the users of the goods, and trade channels will be the same. There is no competition but there is, to my mind, a degree of complementarity as rice is indispensable to the service of retailing/wholesaling of rice and the consumer may believe that the retail/wholesale services and the goods are the responsibility of the same undertaking.

27. I find there to be at least a medium degree of similarity between the opponent's goods and the applicant's '*Retail or wholesale services connected with the sale of Basmati rice originating from India and/or Pakistan*'.

The average consumer and the nature of the purchasing act

28. It is necessary to determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer 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*".

29. For the purposes of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question.[1]

30. The respective goods are reasonably cheap and made for every-day consumption and are likely to be purchased by the general public frequently, whilst exercising a

[1] *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV*, (Case C-342/97, para 26).

fairly low level of attention. This is because the consumer will merely consider elements such as the type of rice (e.g., the length of the Basmati grain) or the cooking time when buying the goods without paying attention to other aspects. Similar considerations apply to the contested services.

31. The goods are likely to be obtained directly from the provider via websites or in specialised retail outlets. As such, it is my view that the purchasing process will be predominantly visual in nature for the goods at issue. I would also expect the applicant's services to be encountered primarily visually. However, aural considerations in the form of word-of-mouth recommendations or verbal discussions with the provider, for instance, cannot be excluded entirely.

Comparison of trade marks

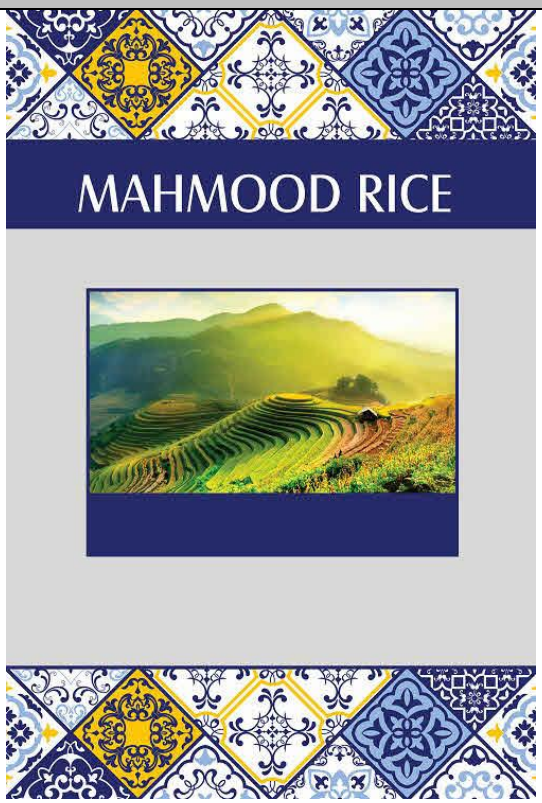
32. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

33. 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*".

34. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the trade marks.

35. The trade marks to be compared are as follows:

Earlier trade mark	Contested trade mark
	

Overall impression

36. The Contested Mark features the words ‘MAMMUT RICE’ placed at the top of the mark in capital letters and in a predominant position in relation to the other verbal elements contained in the Contested Mark. Underneath the words ‘MAMMUT RICE’ the mark shows words in both English and in a foreign language (perhaps Turkish given the Applicant’s nationality) in Roman characters and in non-Roman alphabet. The mark contains the words ‘MAMUT PIRINC’ (which might translate to ‘MAMMUT RICE’ in a foreign language). The additional English words contained in the Contested Mark are descriptive of the goods such as ‘1121 quality sella basmati’, ‘healthy’, tasty’, ‘hygienic’, ‘100% fresh’. The Contested Mark also features a figurative device representing a mammoth topped by the words ‘MAMMUT’, a bowl of rice and an additional figurative device resembling a certification logo containing the words “1121 sella”, “Premium”, and “Basmati rice” along with seven stars. The Contested Mark also has a floral decorative background at the top and the representation of an agricultural landscape at the bottom of it.

37. The Earlier Mark comprises the words ‘MAHMOOD RICE’ at the top, the image of a terraced agricultural landscape at the centre, and a decorative pattern at the top and bottom of the mark resembling a decoration of ‘azulejos’ tiles.

38. The Applicant submits that (my underlining):

> “*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*”.
>
> “*The Applicant accepts that the respective marks both start with two words, where the first word of the pair begins with the letter M and the second word is ‘RICE’.*”
>
> “*The second word of each mark, is the same word ‘RICE’ but this word is entirely descriptive of the goods and services related to rice and devoid of any distinctive character.*”
>
> “*[…] the concept of agricultural landscape images and decorative background ornamentation is common in the trade for packaging of rice. Because such features are common for packaging labels for rice sold in the UK, these elements are therefore lacking in distinctive character*”.

39. I find that the overall impression of the Earlier Mark and Contested Mark is dominated, respectively, by the distinctive words ‘MAHMOOD’ and ‘MAMMUT’ (along with the distinctive figurative device featuring a mammoth). The other verbal elements, foreign words, images, and figurative devices are either descriptive, sufficiently banal, or commonplace to make a much lesser contribution to the overall impression of the marks.

Visual similarity

40. The Earlier and Contested Marks both contain an agricultural image resembling a rice field. In the Earlier Mark the image is placed in colour at the centre of the mark, while in the Contested Mark the image is at the bottom and functions more as a background to the verbal and figurative elements. Those depictions are, though,

not the same. Both the Earlier and Contested Mark also feature a decorative pattern. However, in the Earlier Mark the pattern resembles colourful tiles or some type of ornament, whilst the Contested Mark features a floral design placed as a background for the verbal elements contained in the mark. Both marks show two words placed in a predominant position in capital letters: 'MAHMOOD RICE' and 'MAMMUT RICE'.

41. The Applicant submits that (my underlining):

> "*the Applicant accepts that the respective marks both start with two words, where the first word of the pair begins with the letter M and the second word is 'RICE'. Both marks appear to have a vaguely similar design structure with the aforementioned word pair appearing at the top of the mark, and with decorative patterns in the background and landscape images below the words*".

42. I appreciate both marks might share a common visual structure (i.e., combination of words, images, and decorative background), however I find the Contested Mark to be busier than the Earlier Mark as it features various additional words (in English and foreign languages) all placed under the words 'MAMMUT RICE'. This is also stated by the Applicant who submits that: "[the Mark Applied For] *is a complex mark with many words and graphic device elements which are different to the Earlier Mark*".

43. The Contested Mark also contains a figurative device representing the image of a mammoth placed underneath the word 'MAMMUT' contained in a round-edged square, the representation of a bowl of rice, and a circular device resembling a certification stamp. None of these elements are present in the earlier mark.

44. Turning to the predominant distinctive elements 'MAHMOOD' and 'MAMMUT', the two words exclusively share the first two letters "MA" and the fourth letter "M". However, the two words differ in their endings i.e. 'OOD' and 'UT'. 'MAHMOOD' also contains an "H" following "MA" which differs from the third letter of 'MAMMUT'.

45. In light of the above considerations, and when considering the marks overall, they are not visually similar. If I am wrong about that any visual similarity is very low.

Aural similarity

46. I will focus my analysis of the aural similarity exclusively on the words 'MAHMOOD RICE' and 'MAMMUT RICE' because it is likely, in my view, that the consumer will refer to the respective marks solely by those words. The pronunciation of 'RICE' in both marks is obviously identical. As for 'MAHMOOD' and 'MAMMUT', the first is composed of two syllables which is likely to be pronounced as MA-MOOD while the latter contains two syllables which is likely to be pronounced as MA-MUT. The first syllable of the marks is therefore likely to sound the same. The second syllables, 'MOOD' and 'MUT' are, in my view similar to a low-medium degree because, although they both begin with the letter 'M', the respective 'OOD' and 'UT' sounds are not particularly similar. Overall, I find an above-medium degree of aural similarity between the marks.

Conceptual similarity

47. The Applicant submits that (my underlining):

"*MAHMOOD will be immediately received as being a common name within the UK, a variant of the name MAHMUD and a cognate of the name Mohammed, Mohammad, Muhammed, etc.*".

48. The Applicant provided evidence aimed at showing that "*variants of this name are very common in the UK as a boy's forename as a surname within the UK*".

49. In **Exhibit DG/3** the Applicant provided a Wikipedia extract stating that Mahmud is a transliteration of the male Arabic given name Mahmud common in most parts of the Islamic world. The page shows a list of foreign people carrying the name Mahmood among which only one is English (Mahmood Hussain).

50. **Exhibit DG/3** reports that the name Muhammad "*has one of the highest numbers of English spelling variants in the world. Other Arabic names from the same root include Mahmud, Ahmed, Hamed, Tahmid and Hamid*".

51. The Applicant submits **Exhibit DG/4** showing that the Office for National Statistics (ONS) has ranked the names Muhammad/Mohammed/Mohammad in the top 100

names for popularity since 1924[2] and **Exhibit DG/5** shows that the surname MAHMOOD was among the most popular surnames in Scotland in 2016.

52. In its Witness Statement the Applicant argues that "*the name and its variants have been in the top 100 boys names in England and Wales since 1924*".

53. I note that for a concept to be relevant, it must be capable of immediate grasp by the relevant consumer (*The Picasso Estate v OHIM*, Case C-361/04 P). I find that the average consumer in the UK is likely to perceive 'MAHMOOD' as a surname or, perhaps, a forename (of Arabic origin).

54. The Contested Mark features the word 'MAMMUT' at the top of the mark and inscribed into a round-edged square along with the image of a mammoth. The Applicant submits that "*the word 'MAMMUT' is the translation of the word mammoth in a foreign language*". Given the similarity between the words 'mammut' and the well-known word 'mammoth' (the two words only differ in their last few letters) and the prominent image of a mammoth placed in the Applicant's mark, I believe that the average consumer is likely to be led to understand the word 'MAMMUT' as referring to a mammoth.

55. It follows that, as the earlier mark has the concept of a name (whether surnominal or a forename) whereas the contested mark brings to mind the concept of a mammoth, I find the marks to be conceptually different.

Distinctive character of the Earlier Mark

56. In *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV,* Case C-342/97 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-*

[2] Muhammad was the 12th most popular name given to baby boys in 2015. Mohammed and Mohammad were respectively at 29th and 68th place that same year.

108/97 and C-109/97 WindsurfingChiemsee 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)."

57. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the services, to those with high inherent distinctive character, such as invented words. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

58. The distinctive character of a mark can however be enhanced by virtue of the use that has been made of it. In that regard, I note that the Opponent filed evidence of use of the Earlier Mark at a London trade fair held in 2023 where the products were exposed under the mark 'MAHMOOD' (**Exhibit 1** and **Exhibit 2**). The Opponent submits various commercial invoices to show the distribution of Mahmood-branded rice in the UK. I note that the evidence in **Exhibit 3** shows the Opponent has marketed rice in recent years (2001 and 2023) in the UK. However, all the commercial invoices are directed to the same consignee in Birmingham and from the evidence before me I cannot determine whether the Opponent's goods have subsequently been distributed more widely in the UK. Given that the evidence of use refers to only the last three years, the evidence from 2023 is after the relevant date (being the filing date of the contested mark) and that I cannot determine the geographic extent of the use of the Earlier Mark prior to that date, I do not find that the Opponent's evidence is sufficient to show that the Earlier Mark has acquired

enhanced distinctiveness through use. Accordingly, I have only the inherent position to consider for the Earlier Mark.

59. As explained above, the Earlier Mark's dominant and distinctive element is the word 'MAHMOOD'. As found earlier in this decision, the average consumer in the UK is likely to understand this word as being a name of Arabic origin (either a surname or forename). Regarding the additional figurative elements contained in the mark (i.e., image of an agricultural landscape and ornamental patterns at the top and bottom of the mark) I find that these elements do not imbue the Earlier Mark with any significant additional distinctive character. I find that the earlier mark has a medium degree of inherent distinctiveness.

Likelihood of confusion

60. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

61. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. The concept of indirect confusion was explained by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10 as follows:

> "*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"."

62. I have found the respective goods to be identical and the applicant's services have at least a medium degree of similarity with the opponent's goods. The average consumer is likely to pay a fairly low level of attention in their selection. The distinctiveness of the Earlier Mark is of a medium level. The marks have a very low degree of visual similarity (if they are visually similar at all), an above-medium degree of aural similarity and are conceptually different. The purchase of the respective goods is considered to be mainly visual but the potential for aural use is borne in mind. Weighing all of these factors, and even bearing in mind the effects of imperfect recollection, I find that the average consumer is unlikely to mistake one mark for the other. Thus, I do not find there is a likelihood of direct confusion between the marks. Further, I can see no basis for finding that, having recognised that the marks are not the same, the average consumer is nevertheless likely to believe that they come from the same or linked undertaking(s). There is no likelihood of indirect confusion.

Conclusion

63. The opposition fails under section 5(2)(b) of the Act.

64. The Applicant has been successful. Subject to any successful appeal, the application by Hilltop Impex GmbH may proceed to registration.

Costs

65. The Applicant has been successful and is entitled to an award of costs. The relevant scale is contained in Tribunal Practice Notice ("TPN") 2/2016. Bearing that scale in mind, I award costs to the Opponent as follows:

Considering the notice of opposition and preparing the counterstatement:	£200

Preparing submissions and evidence and considering and commenting on the other side's evidence	£500
Total:	£700

66. I order ALTUNKAYA INSAAT NAKLIYAT GIDA TICARET ANONIM SIRKETI to pay Hilltop Impex GmbH the sum of **£700**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 27th day of June 2024

Andrea Rossi

For the Registrar