

O-0650-24

TRADE MARKS ACT 1994  
IN THE MATTER OF APPLICATION NO. 3902733  
FOR THE TRADE MARK



IN THE NAME OF ARDENT LOGISTICS LTD

AND

AN OPPOSITION UNDER NO. 60002913

BY AROMABASKET LIMITED

## Background and pleadings

1. On 19 April 2023, Ardent Logistics Ltd (“the applicant”) filed an application for the trademark shown on the cover page of this decision.

2. The applicant’s mark was published for opposition purposes on 5 May 2023 for the following goods:

### **Class 29**

Sunflower Oil

### **Class 30**

Basmati Rice

3. On 9 June 2023, AROMABASKET LIMITED (“the opponent”) filed a notice of opposition under the fast-track opposition procedure. The opposition is made against all of the goods in the application and is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies on the following UK trade mark, for its goods in classes 29 and 30:

UKTM: 3533868



**Filed:** 6 September 2020

**Registered:** 8 January 2021

### **Class 29**

Abalones [not live]; Abalones, not live; Abura-age [pieces of fried tofu]; Acidophilus milk; Agar-agar for culinary purposes; Air-dried sausages; Ajvar [preserved peppers]; Albumen for culinary purposes; Albumin milk; Algae

prepared for human foods; Alginates for culinary purposes; Almond butter; Almond jelly; Almond milk; Almond milk for culinary purposes; Almond milk-based beverages; Almonds, ground; Almonds (Prepared -);Aloe vera prepared for human consumption; Anchovy; Anchovy fillets; Anchovy, not live; Anchovy paste; Andouillettes; Animal fats for food; Animal kidneys [offal];Animal marrow for food; Animal oils for food; Antipasto salads; Apple butter; Apple chips; Apple flakes; Apple puree; Apple purée; Apple sauce (compote); Ark shells, not live; Ark-shells [not live];Ark-shells, not live; Aromatized fruit; Arrangements of cut fruit; Arrangements of processed fruit; Artichoke paste; Artichokes, preserved; Artificial cream; Artificial cream (dairy product substitutes);Artificial fish roes; Artificial milk based desserts; Artificial sausage skins; Aspic; Aubergine paste; Bacon; Bacon bits; Bacon rinds; Baked beans; Banana chips; Bean curd; Bean dip; Beancurd sticks; Beans; Beans cooked in soy sauce (Kongjaban); Beans, preserved; Beef; Beef bouillon; Beef fat; Beef jerky; Beef meatballs; Beef slices; Beef steaks; Beef stew; Beef tallow [for food];Beef tripe; Beefburgers; Berries, preserved; Beverages consisting primarily of milk; Beverages consisting principally of milk; Beverages having a milk base; Beverages made from milk; Beverages made from yoghurt; Beverages made from yogurt; Beverages made with yoghurt; Beverages made with yogurt; Birds eggs and egg products; Bisques; Black caviar; Black currants, processed; Black pudding; Black pudding [blood sausage]; Blackberry jam; Black-bone chickens, not live; Blackcurrants, processed; Blanched nuts; Blended butter; Blended cheese; Blended oil [for food];Blended oil for food; Blended vegetable oils for culinary purposes; Blocks of boiled, smoked and then dried bonitos (katsuo-bushi); Blood sausage; Blue cheese; Blue mussels [not live].

### **Class 30**

Acanthopanax tea (Ogapicha); Achar pachranga (fruit pickle); Acid drops [confectionery];Adlay flour for food; Aerated beverages [with coffee, cocoa or chocolate base];Aerated chocolate; Aerated drinks [with coffee, cocoa or chocolate base];Agave syrup for use as a natural sweetener; Agave syrup [natural sweetener];Aioli; Alfredo sauce; Alimentary pasta; Alimentary paste

[dough]; Alimentary seasonings; Allspice; Almond cake; Almond confectionery; Almond cookies; Almond flavorings, other than essential oils; Almond flour; Almond paste; Almond pastries; Almonds covered in chocolate; Angelica; Aniseed; Aniseeds for use as a seasoning; Aperitif biscuits; Apple cider vinegar; Apple flavoured tea [other than for medicinal use]; Apple fritters; Apple pies; Apple sauce [condiment]; Apple tarts; Aromatic preparations for cakes; Aromatic preparations for candies; Aromatic preparations for food; Aromatic preparations for ice-creams; Aromatic preparations for making non-medicated infusions; Aromatic preparations for making non-medicated tisanes; Aromatic preparations for pastries; Aromatic teas [other than for medicinal use]; Artichoke sauce; Artificial coffee; Artificial rice [uncooked]; Artificial tea; Artificial tea [other than for medicinal use]; Asian apricot tea (maesilcha); Asian noodles; Bacon buns; Bagels; Baguettes; Bakery goods; Baking powder; Baking powders; Baking soda; Baking soda [bicarbonate of soda for baking purposes]; Baking soda [bicarbonate of soda for cooking purposes]; Baking spices; Baking-powder; Baklava; Balsamic vinegar; Banana fritters; Baozi; Baozi [stuffed buns]; Baps; Barbecue sauce; Barley (Crushed -); Barley flakes; Barley flour [for food]; Barley flour for food; Barley for use as a coffee substitute; Barley (Husked -); Barley meal; Barley prepared for human consumption; Barley tea; Barley-leaf tea; Barm cakes; Bars based on wheat; Bars of sweet jellied bean paste (Yohkan); Bases for making milk shakes [flavourings]; Basil, dried; Batter for making crepes; Batter for making pancakes; Batter mixes; Batter mixes for okonomiyaki [Japanese savory pancakes]; Batter mixes for okonomiyaki [Japanese savoury pancakes]; Bavarian creams; Bean jam buns; Bean meal; Bean paste; Bean-jam filled wafers (monaka); Bean-starch noodles (harusame, uncooked); Bee glue; Beer vinegar; Beverages based on chocolate; Beverages based on coffee; Beverages based on coffee substitutes; Beverages based on tea; Beverages (Chocolate-based -); Beverages (Cocoa-based -).

4. The opponent's trade mark is an earlier mark in accordance with section 6 of the Act. It did not complete its registration process more than 5 years before the filing date

of the applicant's mark and is therefore not subject to the proof of use provisions contained in section 6A of the Act. Accordingly, the opponent can rely on all of the goods for which its mark is registered.

5. The opponent's claim is that registration of the marks would be contrary to section 5(2)(b) of the Trade Marks Act 1994 ("the Act"), which states:

*"(2) A trade mark shall not be registered if because—*

*(a) —*

*(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."*

6. The full extent of the opponent's pleading in this case as to why there is a likelihood of confusion is, *"The name is too similar and the goods provided are almost identical"*.<sup>1</sup>

7. The applicant filed a counterstatement in which it denied the ground of opposition. The full extent of its pleadings is as follows:

*"1. The application is for two products only, namely;*

*(a) Golden Sella Basmati Rice. The opponent is not offering Golden Sella Basmati Rice, therefore not selling similar goods.*

*(b) Refined Sunflower Oil. The opponent is not offering sunflower oil, this application will not in any way affect their business*

*2. The trade mark name is Fine Harvest which is represented figuratively and completely different in words, logo and figurative use by the opponent.*

---

<sup>1</sup> See the response to question 16 in the opponents notice of opposition.

*The customers can not confuse the two names because they are different wordings, they are different in appearance, different shape, different colors and they are represented differently.”*

8. Neither side sought permission to file evidence in this case, nor did they request a hearing<sup>2</sup> or file submissions in lieu. The applicant represented themselves. The opponent was represented by Alpha Accountants (London) Limited.

### **Status of EU case law**

9. 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 that predate the UK’s withdrawal from the EU.

### **DECISION**

10. I bear in mind the following principles gleaned from the judgments 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 Office for Harmonisation in the Internal Market (OHIM)*, Case C3/03, *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;

---

<sup>2</sup> In accordance with Rules 6 and 62(5) of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235.

(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 the 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 to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### Comparison of goods

11. The goods to be compared are as follows:

| Opponent's goods  | Applicant's goods                                    |
|---|--|
| <p><b>Class 29:</b><br/>           Abalones [not live]; Abalones, not live; Abura-age [pieces of fried tofu]; Acidophilus milk; Agar-agar for culinary purposes; Air-dried sausages; Ajvar [preserved peppers]; Albumen for culinary purposes; Albumin milk; Algae prepared for human foods; Alginates for culinary purposes; Almond butter; Almond jelly; Almond milk; Almond milk for culinary purposes; Almond milk-based beverages; Almonds, ground; Almonds (Prepared -); Aloe vera prepared for human consumption; Anchovy; Anchovy fillets; Anchovy, not live; Anchovy paste; Andouillettes; Animal fats for food; Animal kidneys [offal]; Animal marrow for food; Animal oils for food; Antipasto salads; Apple butter; Apple chips; Apple flakes; Apple puree; Apple purée; Apple sauce (compote); Ark shells, not live; Ark-shells [not live]; Ark-shells, not live; Aromatized fruit; Arrangements of cut fruit; Arrangements of processed fruit; Artichoke paste; Artichokes, preserved; Artificial cream; Artificial cream</p> | <p><b>Class 29:</b><br/>           Sunflower oil</p> |

(dairy product substitutes);Artificial fish roes; Artificial milk based desserts; Artificial sausage skins; Aspic; Aubergine paste; Bacon; Bacon bits; Bacon rinds; Baked beans; Banana chips; Bean curd; Bean dip; Beancurd sticks; Beans; Beans cooked in soy sauce (Kongjaban); Beans, preserved; Beef; Beef bouillon; Beef fat; Beef jerky; Beef meatballs; Beef slices; Beef steaks; Beef stew; Beef tallow [for food];Beef tripe; Beefburgers; Berries, preserved; Beverages consisting primarily of milk; Beverages consisting principally of milk; Beverages having a milk base; Beverages made from milk; Beverages made from yoghurt; Beverages made from yogurt; Beverages made with yoghurt; Beverages made with yogurt; Birds eggs and egg products; Bisques; Black caviar; Black currants, processed; Black pudding; Black pudding [blood sausage]; Blackberry jam; Black-bone chickens, not live; Blackcurrants, processed; Blanched nuts; Blended butter; Blended cheese; Blended oil [for food];Blended oil for food; Blended vegetable oils for culinary purposes; Blocks of boiled, smoked and then dried bonitos (katsuo-bushi); Blood sausage; Blue cheese; Blue mussels [not live].

**Class 30:**

Acanthopanax tea (Ogapicha); Achar pachranga (fruit pickle); Acid drops [confectionery]; Adlay flour for food; Aerated beverages [with coffee, cocoa or chocolate base]; Aerated chocolate; Aerated drinks [with coffee, cocoa or chocolate base]; Agave syrup for use as a natural sweetener; Agave syrup [natural sweetener]; Aioli; Alfredo sauce; Alimentary pasta; Alimentary paste [dough]; Alimentary seasonings; Allspice; Almond cake; Almond confectionery; Almond cookies; Almond

**Class 30:**

Basmati rice

flavorings, other than essential oils; Almond flour; Almond paste; Almond pastries; Almonds covered in chocolate; Angelica; Aniseed; Aniseeds for use as a seasoning; Aperitif biscuits; Apple cider vinegar; Apple flavoured tea [other than for medicinal use]; Apple fritters; Apple pies; Apple sauce [condiment]; Apple tarts; Aromatic preparations for cakes; Aromatic preparations for candies; Aromatic preparations for food; Aromatic preparations for ice-creams; Aromatic preparations for making non-medicated infusions; Aromatic preparations for making non-medicated tisanes; Aromatic preparations for pastries; Aromatic teas [other than for medicinal use]; Artichoke sauce; Artificial coffee; Artificial rice [uncooked]; Artificial tea; Artificial tea [other than for medicinal use]; Asian apricot tea (maesilcha); Asian noodles; Bacon buns; Bagels; Baguettes; Bakery goods; Baking powder; Baking powders; Baking soda; Baking soda [bicarbonate of soda for baking purposes]; Baking soda [bicarbonate of soda for cooking purposes]; Baking spices; Baking-powder; Baklava; Balsamic vinegar; Banana fritters; Baozi; Baozi [stuffed buns]; Baps; Barbecue sauce; Barley (Crushed -); Barley flakes; Barley flour [for food]; Barley flour for food; Barley for use as a coffee substitute; Barley (Husked -); Barley meal; Barley prepared for human consumption; Barley tea; Barley-leaf tea; Barm cakes; Bars based on wheat; Bars of sweet jellied bean paste (Yohkan); Bases for making milk shakes [flavourings]; Basil, dried; Batter for making crepes; Batter for making pancakes; Batter mixes; Batter mixes for okonomiyaki [Japanese savory pancakes]; Batter mixes for okonomiyaki [Japanese savoury pancakes]; Bavarian creams; Bean jam buns;

|   |  |
|---|--|
| Bean meal; Bean paste; Bean-jam filled wafers (monaka); Bean-starch noodles (harusame, uncooked); Bee glue; Beer vinegar; Beverages based on chocolate; Beverages based on coffee; Beverages based on coffee substitutes; Beverages based on tea; Beverages (Chocolate-based -); Beverages (Cocoa-based -). |  |
|---|--|

12. I bear in mind the decision in *Gérard Meric v OHIM*,<sup>3</sup> (*Meric*) in which the General Court stated that:

“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”.

13. Also the decision in *Canon*, where the Court of Justice of the European Union (“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”.

14. Guidance on this issue has also come from Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Ltd* (the Treat case), [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(a) The respective uses of the respective goods or services;

---

<sup>3</sup> Case T- 133/05.

- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are 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;
- (f) 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.

15. I note that the applicant says that its goods are 'Golden Sella Basmati Rice' and 'Refined Sunflower Oil' and that the opponent's goods are not similar. The applicant's specification in class 29 is for 'Basmati Rice' and in class 30 is for 'Sunflower Oil'. In making the assessments necessary to reach a decision on the similarity of goods in this case, it is the terms as they appear in the applied for specification that I must consider.

16. The applicant submits that the opponent is not selling goods similar to its own goods. Beyond that submission, the parties are silent on the matter of the comparison between their respective goods. Given that the application is made for sunflower oil and basmati rice, which are everyday consumer items, I will, as case law allows, rely on my own general knowledge of the relevant goods in making the assessment.<sup>4</sup>

#### The applicant's goods in class 29

---

<sup>4</sup> See LJ Arden in *esure Insurance Ltd v Direct Line Insurance Plc*, [2008] EWCA Civ 842, paragraphs 56 and 57.

17. The applicant has 'sunflower oil' in this class. The opponent has 'Blended oil [for food], Blended oil for food' and 'Blended vegetable oils for culinary purposes'. The users and uses of these goods are the same, being people who use oil for cooking food. The nature of the goods is the same, being oils for cooking. The goods are likely to be displayed in close proximity to each other on websites and on shelves in stores. They are also in competition, as someone could use a blended oil, vegetable oil or sunflower oil for the same or similar culinary purposes. I find these goods to be very highly similar.

#### The applicant's goods in class 30

18. The applicant has 'basmati rice' in this class. The opponent has 'artificial rice'. The parties have not provided any information as to the nature of artificial rice. It is my understanding that it is made from pieces of broken rice made into rice shapes. It may be mixed with other grains and/or have nutrients added. The user will be someone wanting to cook rice and both parties' goods will fulfil that requirement, meaning that the users and uses may be the same. The nature of the goods is highly similar, the applicant's being rice, the opponent's being an artificial rice product. The goods may be displayed in the same area of stores and websites. The goods may differ in the way that they reach the market with the applicant's goods being a grown rice product, while the opponent's artificial rice requires processing before reaching the market. The goods may be in competition. Overall, I find the goods to be similar to a medium to high degree.

#### **The average consumer and the nature of the purchasing act**

19. 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”.

20. The average consumers of the goods will be members of the general public as well as food businesses. The goods are likely to be sold through retail stores such as supermarkets, food wholesalers and their online equivalents. In stores, they will be displayed on shelves, where they will be viewed and selected by the consumer. A similar process will apply where the consumer views and purchases the goods online. The selection of the goods is primarily visual, although I do not discount that aural considerations may be relevant where, for example, advice is sought prior to purchase. The goods are likely to be fairly inexpensive and fairly frequent purchases. The level of attention to be paid will be at least medium, given that the goods are for human consumption and will require considerations to be made regarding production methods, origin and so on.

### Comparison of marks

21. The marks to be compared are:

| Opponent's mark   | Applicant's mark   |
|---|--|
|  |  |

22. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by them, bearing in mind their distinctive and dominant components but

without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.<sup>5</sup>

23. The earlier mark is the words 'The Fine' in title case, presented above and slightly to the right of the word 'Harvest', which is larger than the first two words. The crossbar of the capital letter H of 'Harvest' finishes in the form of an ear of wheat, or similar. The mark is presented in a blue/green colour in a stylised script typeface. The stylisation will not go unnoticed, but it is the words 'The Fine Harvest' that play the greater role in the overall impression of the mark, being the part that will be read and articulated by the average consumer.

24. The applicant's mark is the words, 'FINE HARVEST' in capital letters, coloured yellow and presented within a red oval. The oval has a white outline surrounding it and filigree elements above and below the oval shape. The oval and filigree elements will be seen as decorative and it is the words 'FINE HARVEST' that play the greater role in the overall impression of the mark, the eye naturally being drawn to the part of the mark that can be read.

### **Visual similarity**

25. Both parties marks contain the words 'FINE HARVEST'. The earlier mark also includes the definite article at the beginning. Additional differences are the 'ear of wheat' making the crossbar of the letter 'H' in the earlier mark and its blue green colour, which is different to the red and yellow colours in the application. Overall, I find the marks visually similar to a low to medium degree.

### **Aural similarity**

26. Both marks are made up of common words in the English language and will be pronounced accordingly. The second two words of the earlier mark and the entirety of the application are FINE and HARVEST. The only difference is the addition of 'The' in the earlier mark. I find the marks aurally similar to a very high degree.

---

<sup>5</sup> *Sabel v Puma AG*, para.23.

## Conceptual comparison

27. In both marks the conceptual message is that of a fine harvest, which may be seen as a good harvest or a high quality one. The addition of the definite article in the earlier mark adds specificity to the general conceptual message. Overall, I find these marks conceptually similar to a high degree.

## Distinctive character of earlier marks

28. In determining the distinctive character of a trade mark it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been used as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger*.<sup>6</sup>

“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-2779, 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

---

<sup>6</sup> Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

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).”

29. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words that have no allusive qualities.

30. The distinctiveness of a trade mark can be enhanced by the use made of it, but in this case I have only the inherent distinctiveness of the earlier mark to consider, this being a fast-track opposition with no evidence filed.

31. The earlier mark is the words ‘The Fine Harvest’, with a small degree of stylisation. The stylisation includes an ear of wheat or similar cereal product, which reinforces the ‘harvest’ message of the mark. For goods that are foodstuffs the words have a little lower than average distinctiveness, especially where those goods are grain and cereal products and other foods that are harvested. Overall, I find that the mark possesses a little lower than medium degree of inherent distinctive character.

### **Likelihood of confusion**

32. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between them and the goods down to the responsible undertakings being the same or related. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that

they have kept in mind.<sup>7</sup> I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa.

33. I have made the following findings:

- The average consumer is a member of the general public or food business.
- The level of attention paid to the purchase will be at least medium.
- The parties' goods are very highly similar in class 29 and similar to a medium to high degree in class 30.
- The purchase will be primarily visual, although I do not rule out an aural element.
- The parties' marks are visually similar to a low to medium degree, are aurally very highly similar and are conceptually similar to a high degree.
- The earlier mark has a little lower than medium degree of inherent distinctive character.

34. Taking account of the predominantly visual purchasing process and the obvious visual differences between the marks, I do not consider that one will be mistaken for the other. In other words, there is no likelihood of direct confusion.

35. Turning to indirect confusion I bear in mind the types of confusion as they were explained in *L.A. Sugar Limited v By Back Beat Inc.*,<sup>8</sup> by Mr Iain Purvis QC (as he then was), sitting as the Appointed Person:

---

<sup>7</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27.

<sup>8</sup> 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’.”

36. I also bear in mind *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*<sup>9</sup>, in which Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria*<sup>10</sup>, where he said at [16] that ‘a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion’. Arnold L.J. agreed, pointing out that there must be a ‘proper basis’ for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

37. The words Fine Harvest and The Fine Harvest are the elements in the marks that play the greater role than the other elements in the overall impressions of both marks. They are the parts of the marks that will be read and articulated by the average consumer. The marks do contain obvious visual differences. In the application these are decorative elements and in the earlier mark are an ear of wheat device and a script style typeface. Notwithstanding the lower than medium degree of inherent distinctive character possessed by the earlier mark, I find that there is a likelihood of indirect confusion. The examples given by Mr Purvis in LA Sugar are not exhaustive and, in my view include a scenario where a consumer familiar with one Fine Harvest mark for

---

<sup>9</sup> [2021] EWCA Civ 1207.

<sup>10</sup> BL O/219/16.

foodstuffs would, when encountering the other Fine Harvest mark for similar foodstuffs, simply think that they originated from related undertakings.

## **COSTS**

38. The opponent has been successful in its opposition and is entitled to a contribution towards its costs. The relevant Tribunal Practice Notice for these proceedings is TPN 2/2015, which states that costs in an opposition brought under the fast-track procedure are capped at £500 (excluding official fees). As with any costs cap, it does not mean that costs will automatically be awarded at the maximum level. I bear in mind that no submissions were filed by either party. I award costs to the opponent on the following basis:

|  |      |
|--|------|
| Preparing a statement of case and<br>Considering other side's statement: | £200 |
| Official fee:  | £100 |
| Total:   | £300 |

39. I order Ardent Logistics Ltd to pay AROMABASKET LIMITED the sum of £300. 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 10<sup>th</sup> July 2024**

**Al Skilton**

**For the Registrar**

**The Comptroller-General**