O/0714/24

CONSOLIDATED PROCEEDINGS

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NOS. UK00003699888 & UK00003699890 IN THE NAME OF PINAR KURUYEMIS GIDA VE IHTIYAÇ MADDELERI SANAYI TICARET ANONIM SIRKETI FOR THE FOLOWING TRADE MARKS:

AND

IN CLASS 29

AND

APPLICATIONS FOR DECLARATIONS OF INVALIDITY UNDER NOS. 505019 & 505021 BY YADEX INTERNATIONAL GMBH

BACKGROUND AND PLEADINGS

1. PINAR KURUYEMIS GIDA VE IHTIYAÇ MADDELERI SANAYI TICARET ANONIM SIRKETI ("the proprietor") is the owner of the trade marks shown on the cover of this decision in the UK (being those that I will refer to collectively as the contested marks but separately as the first contested mark and second contested mark, respectively). The contested marks were filed on 23 September 2021 and were granted registration on 20 May 2022. Both marks stand registered for the following goods:

Class 29: Dried, preserved, canned, frozen fruits and vegetables; processed fruits and vegetables; tomato puree, tomato paste; Dried nuts; Spiced nuts; Dried fruit-based snacks; Dried fruit; Peanuts, prepared; Processed nuts; Ground nuts; Nuts, prepared; Edible nuts; Salted nuts; Coconut, desiccated; Blanched nuts; Coated peanuts; Prepared coconut; Preserved nuts; Processed fruits; Shelled nuts; Salted cashews; Hazelnuts, prepared; Processed almonds; Snack foods based on nuts; Cashew nuts (Prepared -); Flavoured nuts; Snack mixes consisting of processed fruits and processed nuts; Roasted nuts; Prepared walnuts; Roasted peanuts; Seasoned nuts; Coconut-based snacks; Edible sunflower seeds; Sunflower seeds, prepared; Processed pumpkin seeds; Processed watermelon seeds; Prepared pine nuts; Processed chickpeas; Prepared pistachio; Almonds, ground; Canned peanuts; Mixtures of fruit and nuts.

2. The contested marks were filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union. As a result, they enjoy earlier priority dates of 4 December 2019 (being the same as the filing dates of the proprietor's earlier EUTM).

3. Both marks are subject to cancellation applications brought by Yadex International GmbH ("the applicant") under section 47 of the Trade Marks Act 1994 ("the Act"). The application against the first contested mark was filed on 22 June 2022 and that which was brought against the second was filed on 23 June 2022. Both applications are aimed at all of the goods that the contested marks are registered for and are based on sections 5(2)(b) and 5(3) of the Act.

4. Under both grounds of both applications, the applicant relies on the following marks:

PINAR
UK registration no. 1436628
Filing date 30 July 1990; registration date 14 August 1992
("the applicant's first mark");

UK registration no. 801318704 [1]
Filing date 11 March 2016; registration date 25 February 2020
("the applicant's second mark"); and

Pinar Ac Bitir
UK registration no. 801311650
Filing date 11 March 2006; registration date 3 March 2017
("the applicant's third mark").

[1] The applicant's second and third marks are comparable marks based on earlier International Registrations designating the EU. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing IRs designating the EU.

5. The goods relied on by the applicant are set out in the **Annex** of this decision. In respect of the applicant's reliance upon its first and second marks, all of the goods listed are relied upon under the section 5(2)(b) ground. As for the section 5(3) grounds in respect of those marks, only those goods underlined are relied upon. The goods relied upon under the applicant's third mark differ entirely and, for ease of reference, separated accordingly in said Annex.

6. Under the section 5(2)(b) ground, the applicant claims that the contested marks are similar to its own marks and, further, the goods for which they are registered are identical or highly similar to its own goods. As a result, the applicant claims that there exists a likelihood of confusion between the marks on the part of the public, including a likelihood of association.

7. The applicant's pleadings under the section 5(3) ground set out that it enjoys a large-scale reputation in its marks throughout the UK in respect of the goods relied upon in its notice of opposition. The applicant submits that use of the contested marks would, without due cause, take unfair advantage of the applicant's marks. Further, the applicant claims that use of the contested marks would result in detriment to the distinctive character and/or repute of the applicant's marks.

8. All of the applicant's marks qualify as "earlier trade marks" for the purposes of this decision since they were applied for at earlier dates than the priority date of the contested marks.[2]

9. The proprietor filed a counterstatement wherein, generally, it denied the claims against it and requested that the applicant provide proof of use for its first and second marks. That being said, the proprietor did accept that there is some overlap between the goods in that some are identical and some are similar (although it did claim that some were not and that it would expand upon this further in these proceedings once the applicant provided proof of use of its marks).

[2] See Section 6(1)(a) of the Act.

10. Under the power given to the Tribunal under Rule 62(1)(g) of the Trade Mark Rules 2008, these proceedings were consolidated upon the filing of the counterstatements. This was communicated to the parties by way of written correspondence dated 8 November 2022.

11. The applicant is represented by Stobbs and the proprietor is represented by Forresters IP LLP. Both parties filed evidence in chief. No hearing was requested and only the applicant filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

12. 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

13. The applicant's evidence came in the form of two witness statements, the first being that of Ayhan Durusu dated 1 August 2023, the second being that of Andrew Carver dated 7 August 2023. Mr Durusu is the Accounting and Finance Director of the applicant and has been associated with the company since January 2001. His statement is accompanied by 14 exhibits, being those labelled AD1 to AD14, and has been filed in order to demonstrate genuine use and the existence of a reputation in the applicant's marks. As for Mr Carver, he is a Chartered Trade Mark Attorney at the applicant's representative firm so is, therefore, authorised to file evidence on the applicant's behalf. His statement is accompanied by 17 exhibits, being those labelled AC1 to A17, and has been filed in support of the similarity of the goods at issue.

14. The proprietor's evidence comes in the form of the witness statement of Hasan Hüseyin Karapinar dated 9 October 2023. Mr Karapinar is the Chairman of the

Board of Directors of the proprietor. His statement is accompanied by six exhibits, being those labelled Annex 1 to Annex 6, and was filed to demonstrate a number of points including the meaning of 'PINAR' and the proprietor's own use of its mark.

15. I do not intend to summarise the parties' evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

16. Sections 5(2)(b) and 5(3) of the Act have application in invalidation proceedings because of the provisions of section 47(2) of the Act, which states as follows:

> "47. -
>
> (2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-
>
> (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
>
> (b) […]
>
> unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.
>
> (2ZA) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 5(6).
>
> (2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered-

(i) within the period of 5 years ending with the date of application for the declaration, and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided in section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) 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.

(2D)-(2DA) [Repealed]

(2E) 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.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(2G) An application for a declaration of invalidity on the basis of an earlier trade mark must be refused if it would have been refused, for any of the reasons set out in subsection (2H), had the application for the declaration been made on the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application.

(2H) The reasons referred to in subsection (2G) are-

(a) that on the date in question the earlier trade mark was liable to be declared invalid by virtue of section 3(1)(b), (c) or (d), (and had not yet acquired a distinctive character as mentioned in the words after paragraph (d) in section 3(1));

(b) that the application for a declaration of invalidity is based on section 5(2) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of section 5(2);

(c) that the application for a declaration of invalidity is based on section 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of section 5(3).

(3) […]

(4) […]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed."

Proof of use

17. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

"(6)(1) In this Act an "earlier trade mark" means –

(a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired.

[…]

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

18. Section 6A is also relevant. It reads:

"(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), (aa) 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) [Repealed]

(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."

19. Section 100 of the Act is also relevant. It reads:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

20. As the applicant's third mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

"7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union".

21. The applicant's first mark completed its registration process over five years before the priority dates of the contested marks and the date of the applications at issue. As for the applicant's third mark, this only completed its registration process over five years before the date of the applications at issue and not the priority dates of the contested marks. As a result, both the applicant's first and third marks are subject to the proof of use assessment and, as set out above, the proprietor requested that the applicant provide proof of use in respect of the same.

22. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, 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 Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], 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], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(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]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(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]; *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].”

23. Pursuant to Section 47(2B) of the Act, there are two relevant periods for assessing whether there has been genuine use of the applicant’s first and third marks, the first being the five-year period ending with the priority date of the contested marks (4 December 2019) and the second being the five-year period ending with the dates of the applications for the declaration of invalidity (being 22 June 2022 for the application against the first contested mark and 23 June 2022 for the

application the second). Therefore, the relevant periods for this assessment are 5 December 2014 to 4 December 2019 ("the first relevant period") and 23 June 2017 to 22 June 2022 and 24 June 2017 to 23 June 2022.[3] Given that the second relevant periods only differ by one day, I do not consider it controversial to take the approach of considering those relevant periods as one, namely "the second relevant period".

24. For the avoidance of doubt, the following summary of the evidence will take into account all evidence from both periods, being 5 December 2014 to 23 June 2022. While I appreciate that the two relevant periods differ, they do overlap for approximately two and a half years.

25. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real"[4] because the use would not be "viewed as warranted in the economic sector concerned to maintain or create a share in the mark for the goods or services protected by the mark" is, therefore, not genuine use.

Form of the Mark

26. Before proceeding to consider the evidence of use, I wish to first discuss the fact that the applicant's third mark does not appear in the evidence. Further, I do not consider that use of 'PINAR', solus, (be that as a word only or in the logo format reproduced below) is use of the third mark as registered and neither it is an acceptable variant of the same.[5] The applicant's reliance on the third mark, therefore, fails on the basis that there is no use of the same. For the avoidance of doubt, this applies to the section 5(3) ground also as the issue of proof of use applies to both section 5(2)(b) and 5(3) equally.

[3] For the avoidance of doubt, it is only the second relevant period that is applicable to the applicant's third mark.
[4] *Jumpman* BL O/222/16
[5] On this point, I appreciate that use of a mark as part of a composite mark is acceptable use of a mark as registered if it continues to be the case that the mark as registered continues to be an indicator of origin (see *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12). However, I do not consider that this is the case here as the omission of the distinctive words 'At Bitir' means that the applicant's third mark (which is to be considered as a whole) would no longer be viewed as an indicator of origin. Further, as the distinctiveness lies in the mark as a whole, the removal of those words alters the distinctive character of the same meaning that it is an unacceptable variant.

27. Throughout the applicant's evidence, there is not only use of the word 'PINAR' in word only form (which is clearly use of the first mark as registered) but there is repeated use of the word in the following forms:

28. I do not intend to labour over this point in any great detail but if it is the case that the use of the above logos are not use of the applicant's first mark as registered (on the basis that they are composite marks that continue to identify 'PINAR' as the indicator of origin)[6] then, plainly, they are acceptable variants in accordance with the case law.[7] In short, the distinctiveness of the applicant's first mark lies in the word 'PINAR' itself and while the above examples include figurative elements, the case law referenced above suggests that changes in figurative elements are less likely to change the distinctive character of a mark. I find that this is the case here as the word 'PINAR' in the above examples remain their dominant and distinctive elements.

Evidence of use

29. As a result of what I have said above regarding the applicant's third mark, my assessment will focus on the first mark only. As a UK mark, use in the EU for this mark is not relevant to the present assessment. Therefore, my assessment will focus on use in the UK only.

[6] See *Colloseum*, cited above.
[7] *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22

30. The evidence begins by discussing the history of the brand. I do not intend to repeat this here but will briefly state that the applicant's brand was founded in Türkiye in the 1920s and, since 1973, the applicant has operated under the companies 'Pinar Süt', 'Pinar Et' and 'Pinar Deniz'. The evidence sets out that the companies all produce a range of food and drink products such as milk, butter, cheese, yoghurt, bottled water, lemonade, salami, smoked sausage, ham and seafood, all of which operate under the global 'PINAR' brand. Images of the products bearing the PINAR branding are shown in evidence.[8] These images set out that 'PINAR' is the market leader in various sectors such as dairy, meat, water and fish. While noted, these claims relate solely to Türkiye and the images are taken from the applicant's '.tr' website so it is not clear whether these goods are sold in the UK.

31. In 2000, the applicant set up a subsidiary group under the name Pinar Foods GmbH, which was based in Germany. The aim of this company was to sell PINAR branded food and drinks to the European market (including the UK). In 2015, the net sales of Pinar Foods totalled 48 million Turkish Lira, which Mr Durusu confirms as being around £1.4 million under today's exchange rate. While noted, this is based on the exchange rate as at the date of the witness statement and nothing is provided as to what the exchange rate was in 2015. As a result, I appreciate that these figures may not reflect the true figures as of 2015.

32. The evidence goes on to confirm that the applicant and all of the group companies referred to throughout the evidence are economically related. Further, the evidence confirms that these entities are authorised or have consent of the applicant to use the PINAR marks. This is support by a 'to whom it may concern' letter dated 4 August 2023 from Mr Durusu himself.[9] While noting the date of this letter, I accept the narrative evidence confirming the relationship as sufficient to demonstrate the point.

33. In respect of UK use, the narrative evidence confirms that many of the PINAR-branded products are exported to the UK, which are then sold to consumers via

[8] AD2
[9] AD3

UK-based retailers such as general retailers, wholesalers and food service providers. An example of the goods exported to the UK are shown via catalogue evidence.[10] Having considered the catalogue, I note that it is headed up with both PINAR and Sölen brands. However, the goods shown are all PINAR branded products such as various white cheeses, soft cheeses, sheep and goat's cheese, cream cheese, yoghurt, fruit juices, bottled water, ketchup and mayonnaise.

34. Printouts of the applicant's UK-based website are provided in evidence.[11] I note that the printouts are taken from the internet archive facility, the Wayback Machine, and show dates of 1 September 2018, 17 January 2019 and 28 September 2020. The first two printouts appear to show the applicant's landing page whereas the third shows a range of cheese products such as white cheese, cream cheese and sheep cheese.

35. The evidence goes on to discuss the applicant's social media presence. In relation to this point, I note that it has provided approximately 60 pages of evidence showing printouts showing the UK accounts of the PINAR brand from Facebook, Instagram and Twitter.[12] While the printouts are undated, they show a range of posts from within the relevant periods. I will not discuss them all but note that they show various dairy products such as yoghurts and cheeses. However, it is also noted that the engagement levels of these posts is either non-existent or very limited.

36. In terms of the UK market, the applicant sets out that it has attempted to expand its market share in the UK by exhibiting its goods at food and drinks fairs/exhibitions. Evidence of this comes via photographs and plans of the PINAR stall for the 2017 Speciality & Fine Food Fair which took place in Olympia, London.[13] The photographs show large fridges which have a number of products within them. It is not possible to determine what goods are in the fridge but I consider it reasonable to suggest that they are goods in line with those confirmed

[10] AD4
[11] AD5
[12] AD6
[13] AD8

as being imported to the UK. Accompanying these photographs (and within the same exhibit) is an infographic from the event organiser that shows it is attended by a total audience of 11,191 attendees with 35% of them buying food from caterers and restaurants, 27% buying retail goods and 21% buying wholesale products. It is not clear whether this information relates to the actual 2017 event or if it is information from past events used with the aim of informing the exhibitor of the expected turnout.

37. The evidence discusses the sponsorship of a Turkish cookbook that was published in 2019. A range of printouts showing copies of this book are provided as well as photographs of a book signing and invoices of sales.[14] In addition, printouts from the author's social media accounts are shown.[15] While noted, the inclusion of the 'PINAR' branding is very limited. For example, I note that at a book signing, there was a small 'PINAR' flag at a table and an image of the back cover of the book which has a 'with thanks' section which includes 'PINAR'. While noted and, clearly, demonstrative of a marketing activity, I am not convinced that this branding would necessarily be noticed by consumers.

38. A further printout of the applicant's website is provided that shows a range of retailers that sell 'PINAR' branded goods in the UK.[16] The printout, which is dated 17 October 2018, shows that there are 455 suppliers of 'PINAR' products across the breadth of the UK. On the point of the applicant's suppliers, I note that additional printouts are provided from a third-party retailer's website which show images of PINAR branded products for sale.[17] The printouts are dated 8 November 2016 and 20 April 2019. A range of invoices to this same retailer are provided in this same exhibit. These show the shipment of PINAR branded products between 16 December 2014 and 20 April 2022. I note that there are additional invoices after the latter date, however, these are from outside of the relevant periods. There are 72 pages worth of invoices, however, I note that two invoices are provided per page meaning that there are a total of 144 invoices provided. The invoices are German

[14] AD9
[15] AD10
[16] AD11
[17] AD12

but the products within them can be cross-referenced to the products shown in Exhibit AD4, which I have summarised above. While I have no intention of cross-referencing every item, I have considered some and note that they include repeated sales of white cheeses, soft cheeses, yoghurts and juices, but do not appear to include water or sauces.[18]

39. Additional printouts are provided (again obtained from the Wayback Machine) that show the applicant's PINAR branded cheese products listed for sale on other third-party retailers' websites.[19]

40. In respect of turnover, the applicant has provided narrative evidence that confirms the following full sales figures for PINAR products in the UK and Europe:

Year	**Sales Figures (€)**
2014	170,231
2015	1,236,060
2016	1,215,881
2017	891,306
2018	856,796
2019	994,408
2020	1,164,492
2021	1,171,502
2022	1,246,194
Total:	8,946,870

41. I note that specific turnover figures for UK sales of 'LABNE' products are provided.[20] While noted, I have nothing to suggest what 'LABNE' is, be that a yoghurt, cheese or a juice, for example. It is possible that it may be a type of product that falls within the applicant's specification but, equally, it may not be. As

[18] It is noted that the lack of identification of sauces or bottled water is a result of my own searches conducted on the 144 invoices provided. If it is the case that such goods are included in the invoices, I consider it reasonable to suggest that the applicant should have directly referred to the same.
[19] AD13
[20] AD14

such, I do not consider that this evidence is of any assistance. Even if it were, it shows only a total sales figures of €11,264 in 2016 and €37,051 in 2021, both being very limited levels of use.

Assessment of evidence

42. In considering the turnover figures provided, it is noted that these cover the entirety of Europe and the UK. As I have set out above, the assessment here is based on the applicant's first mark, which is a UK mark, meaning that any use in the EU is of no assistance to this assessment. The turnover provided is not particularly large when viewed in the context of the entire relevant markets for the UK and EU. Further, it is not broken down in any way, meaning that it is not possible for me to determine how the turnover relates to the UK or what proportion can be attributed to the goods relied upon.[21] While the applicant has attempted to provide some breakdown in respect of UK only use, this is in relation to a product that I am unable to identify so, as above, is of no assistance.

43. While the evidence is not without its difficulties, the remaining evidence overall is, in my view, sufficient to overcome the aforementioned problem with the applicant's turnover evidence. For example, during the relevant period, the applicant sold its products through 455 retailers across the UK. While no turnover for these retailers is provided, it is reasonable to suggest that such a presence would result in a consistent level of sales of the goods relied upon. In addition, the applicant has demonstrated an attempt to penetrate the UK market by attending trade shows that are attended by a respectable level of attendees. Further, the evidence before me suggests that the attendance at these events is likely to result in some sales being made. There is also evidence of a repeated presence of social media activity in the UK and while this is not demonstrative of a level of use, it is sufficient to demonstrate that the applicant has repeatedly attempted to expand in the UK. Lastly, I am of the view that the evidence that is of the greatest assistance here is the invoices to a third-party retailer throughout the entirety of both relevant periods.

[21] I rely on this point as the evidence seeks to demonstrate use beyond the goods relied upon, such as bottled water, sauces and juices.

The sheer number of invoices between 2014 and 2022 are demonstrative of a consistent and repeated level of use in the UK for the applicant's cheese and yoghurt goods. The fact that the retailer has continued to obtain such goods from the applicant suggests that the products are consistently selling at the retailer's stores and, therefore, points to a sufficient level of sales being achieved.

44. Taking all of the above into account, I am of the view that the evidence before me is sufficient to demonstrate that the applicant has made a genuine attempt to create or preserve a market share for its goods in the UK throughout the entirety of both relevant periods. In respect of a fair specification, I note that under the present ground and in relation to the applicant's first mark, the applicant relies on the following goods only:

> "Milk; milk products and dairy products; cheese, yoghurt, powdered milk for alimentary purposes; all included in Class 29."

45. In the context of the above terms, I note that the evidence only shows use of "cheese" and "yoghurt". Therefore, I am of the view that the finding of genuine use applies to these terms only. As a result, the application in reliance upon the applicant's first mark proceeds in respect of these goods only.

Section 5(2)(b): legislation and case law

46. Section 5(2)(b) of the Act reads as follows:

> "(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 or association with the earlier trade mark."

47. Section 5A of the Act states as follows:

"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."

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

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a 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

49. The proprietor's goods are reproduced at paragraph one of this decision whereas the applicant's goods under its first mark are those that were subject to the genuine use assessment above. As for the goods for which its second mark is protected, these are set out in the Annex to this decision.

50. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "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".

51. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

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

(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.

52. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, 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."

53. As discussed above, the applicant has filed evidence that attempts to point to various overlaps between the parties' goods. I do not intend to discuss this here but will, where necessary, address it further below. In addition, the applicant has filed submissions in respect of the comparison of the goods at issue. I can confirm that I have taken these submissions into account but will not discuss them in any detail.

54. In conducting this comparison, I will begin with the goods in the applicant's second mark's specification. The reasons for doing so will become obvious below when it comes to considering the goods in the first mark's specification.

<u>The proprietor's goods against the applicant's second mark</u>

Dried, preserved, canned, frozen fruits and vegetables; processed fruits and vegetables; processed fruits.

55. The applicant's specification includes the terms "canned fruit", "canned vegetables", "pickled fruits", "cooked fruit", "dried fruits" and "vegetables, frozen".

All of these goods fall within the above terms of the proprietor and, therefore, are identical under the principle outlined in *Meric*. Even if I am wrong to find identity for some of the above goods (on the basis that the applicant's fruit goods are not frozen or processed, for example), then they are clearly highly similar. This is on the basis that both parties' goods are fruits or vegetables which are simply provided in a different way. Regardless of how they are prepared and provided, their natures and methods of use will be the same. As will their purposes and users in that they will all be consumed by the same consumers. Failing that, they are competitive in nature in that a user may elect to pick a frozen fruit over a canned fruit, or vice versa. Lastly, all of these goods will be produced and provided by the same undertakings meaning that there is an overlap in trade channels.

Tomato puree, tomato paste; dried fruit.

56. All of the above terms appear in the applicant's specification and are, therefore, self-evidently identical.

Dried fruit-based snacks.

57. In my view, a dried fruit-based snack is likely to cover bags of dried fruit that are consumed as a snack. I consider that this term is, therefore, the same as "dried fruits" in the applicant's specification. If I am wrong and they are not the same goods, then they are still highly similar on the basis that their natures, method of use, purpose, trade channels and users will all be the same.

Coconut, desiccated; prepared coconut; coconut-based snacks.

58. On the basis that a coconut is a type of fruit, the above goods of the proprietor can be said to be fruit goods and can, therefore, be said to fall within the applicant's terms of "fruit desserts", "fruit preserves" and "dried fruit". These goods are, therefore, identical under the principle outlined in *Meric*. Failing that, the goods are highly similar on the basis that they will overlap in nature, method of use, purpose, trade channels and user.

Dried nuts; Spiced nuts; Peanuts, prepared; Processed nuts; Ground nuts; Nuts, prepared; Edible nuts; Salted nuts; Blanched nuts; Coated peanuts; Shelled nuts; Salted cashews; Hazelnuts, prepared; Processed almonds; Cashew nuts (Prepared -); Flavoured nuts; Roasted nuts; Prepared walnuts; Roasted peanuts; Seasoned nuts; Preserved nuts; Prepared pine nuts; Prepared pistachio; Almonds, ground; Canned peanuts; snack foods based on nuts.

59. In my view, the closest term that I can identify in the applicant's specification is "dried fruits". As discussed above, I have evidence that was introduced to demonstrate an overlap in trade channels between these goods. I appreciate that the evidence shows that at the relevant date, a range of retailers sold both types of goods. These include large retailers (such as Waitrose)[22] and a range of specialist retailers (such as Mediterranean and Turkish retailers).[23] While this evidence is of some assistance, I am of the view that a finding of an overlap in trade channels here is something I can find without the need to rely upon evidence. I say this because, in my view, it is common for dried fruit and nuts to be sold together in the same packaging (bags of raisins and cashews, for example) and, therefore, produced by the same undertakings. Even where the goods are not sold in the same packaging, they are likely to be found in similar locations of retail stores. I say this not only on the basis of large supermarkets but health food stores that are likely to sell a range of dried fruits in close proximity with a range of nuts. In either type of store, it is my understanding that dried fruit and bags of nuts are sold alongside each other. Further, when such goods are bought online, they are likely to be available in the same sections of the retailers' websites.

60. As consumable food products, while the natures may differ (one side there are nuts and, on the other, there are fruits), there is some overlap in method of use and purpose (on the basis that all of the terms cover snack goods that will be consumed as such or used as ingredients for baking/cooking). In terms of user, both parties' goods will be selected by the same consumer and, further, may have some degree

[22] See AC1
[23] See AC1 and AC2 as well as AC4 to AC6

of competitive nature. The latter point is on the basis that a consumer looking for a quick snack may wish to select dried fruits over nuts, or vice versa. Taking all of this into account, I am of the view that these goods are similar to at least a medium degree.

Mixtures of fruit and nuts; snack mixes consisting of processed fruits and processed nuts.

61. The above terms will, inevitably, include dried fruits. While that may be the case, they cannot be said to be identical on the principle outlined in *Meric* with "dried fruits" in the applicant's specification. This is because the applicant's term does not include any type of nut goods. Having said that, the goods are highly similar. I say this because they have a very similar nature and the same methods of use, purposes and trade channels as each other. Lastly, the goods will be selected by the same user or, alternatively, will be competitive in nature due to the fact that users may choose one over the other in the event that they are seeking a quick snack.

Processed pumpkin seeds; Processed watermelon seeds.

62. While pumpkins and watermelon are types of fruit, the above terms do not cover goods that can be said to be "dried fruits", being a term in the applicant's specification. That being said, I am of the view that there is a degree of similarity between them. As has been the case throughout this comparison, both parties' goods at issue here cover snacks that will overlap in nature to some degree but also share method of use, purpose, trade channels and user. As a result, I find that the goods are similar to a high degree.

Edible sunflower seeds; Sunflower seeds, prepared; Processed chickpeas.

63. Firstly, I consider that processed chickpeas, while goods used in cooking, they may similarly be consumed as a healthy snack (i.e., dried, roasted and salted chickpeas) Following the same logic discussed in the preceding paragraph, I am

of the view that the above goods are similar to “dried fruits” in the applicant’s specification to a high degree.

The proprietor’s goods against the applicant’s first mark

64. I appreciate that the goods comparison I have conducted is on the basis of goods in the applicant’s second mark. While this is sufficient for the present ground to proceed, I consider it necessary to briefly assess the goods of the applicant’s first mark. I remind myself that following my genuine use finding the applicant was only able to rely upon “cheese” and “yoghurts”. In short, I see no reason to find why “yoghurts” is similar to any of the proprietor’s goods to any material degree. While I note that yoghurts are likely to be fruit flavoured or include fruit within them (such as mixing pots, for example), I do not consider that this means that they would cover the same goods. As for similarity, I appreciate that the fruit goods of the proprietor are likely to be sought by the same user that buys yoghurts and that they will both be bought for human consumption. I also appreciate that large supermarkets are likely to also produce and sell these goods under their own brands. All of this being said, if the mere fact that a large supermarket produces and sells a wide range of foodstuffs to the same consumer for them to eat was sufficient to give rise to a level of similarity here, then it would also be the case that any and all foodstuffs would be similar to one another. This is clearly too broad a level of protection for any type of foodstuffs and one I am not willing to find here.

65. As for “cheese”, I appreciate that the applicant has filed evidence by way of a printout from a specialist cheese retailer that shows the sale of cheese, dried fruit and nuts by the same undertaking.[24] While noted, this is just one example of such a practice occurring and is not indicative of it being common in the trade. In my view, even where the parties’ goods are sold by large supermarket chains, they are not available in the same aisles, and neither are they particularly close to one another. Even so, I repeat here what I have said above in that foodstuffs being consumed by the same user and likely sold by large supermarket retailers are not

[24] AC3

sufficient factors that give rise to a finding that these goods are similar. Again, it cannot be the case that these factors alone means that any and all foodstuffs are similar to one another.

66. As a result of what I have said above, my assessment under the present ground will proceed in respect of the applicant's second mark only.

The average consumer and the nature of the purchasing act

67. As the case law set out above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods 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. (as he then was) 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."

68. The goods at issue are those that will be selected by members of the general public at large. The goods at issue will be available via general retailers and their online equivalents or via food/drink establishments such as cafes and restaurants. In stores, the goods will be displayed on shelves where they will be self-selected by the consumer. A similar approach will apply to goods selected online as the consumer will select them after having seen an image of them on a website. In food/drink establishments, the goods are likely to be selected aurally but this will take place after a visual inspection of the goods either in display cabinets, on

menus or lists displayed behind a counter. In my view, the selection process for the goods at issue will be primarily visual but I do not discount an aural component playing a role.

69. The goods will be selected on a frequent basis and will be relatively inexpensive. The factors that the consumer takes into account are likely to include considerations as to flavour, ingredients and nutritional content. As such, I am of the view that the selection process for the goods will, for the most part, attract a medium degree of attention. Having said that, some of the goods are likely to be more casual purposes (such as a small bag of nuts or dried fruit that are selected for a quick snack at checkouts in supermarkets, for example) that are likely to attract a lower degree of attention.

Comparison of the marks

70. It is clear from *Sabel 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.

71. 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."

72. 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 marks and to give due weight to any other features which are not negligible and therefore, contribute to the overall impressions created by the marks.

73. The respective trade marks are shown below:

The applicant's mark	The contested marks
 ("the applicant's second mark")	 ("the first contested mark")  ("the second contested mark")

74. I have detailed submissions from the applicant in respect of the comparison of the marks at issue. While these submissions are noted, I will only discuss them further where I deem it necessary to do so below.

Overall Impression

75. The applicant's second mark is a figurative mark that consists of the words 'PINAR', which is placed above the word 'GO'. 'GO' is presently considerably larger than the word 'PINAR'. 'PINAR' is presented in a bold green slightly stylised

typeface, surrounding which are a number of figurative blemishes in green, red and blue. The word 'GO' is presented in white but edged in green. Within the letter 'O' is what appears to be a red play button device. While I appreciate that 'GO' is presented larger, the word 'PINAR' will be read first as it sits on the top of the mark. While 'GO' will be viewed as having allusive qualities (for reasons I will come to discuss below), I consider that its sheer size in the mark will mean that it will not be overlooked. As a result, I am of the view that 'PINAR' and 'GO' will play an equally dominant role in the overall impression of the applicant's second mark. The stylistic and figurative elements will, however, all play much lesser roles.

76. Both contested marks are figurative marks and both consist of the word 'pinar' presented in a large white and fairly standard typeface which sits above the word 'KURUYEMIS', which is presented considerably smaller and in a standard white typeface. The first contested mark consists of a white swoosh device below the words, with all elements placed on a red square background. The second contested mark consists of a white flourish above the word 'pinar' with all elements sitting on a brownish-grey square background. The proprietor, in its counterstatement, suggests that the word 'KURUYEMIS' and the device elements of the contested marks are their distinctive and dominant elements (on the basis that 'pinar' means 'spring' as in the water source).[25] I will expand on this further below when considering the concept of the marks, however, for now I will simply set out that I disagree with this position. Instead, I am of the view that the word 'pinar' will play the greater role with 'KURUYEMIS' playing a lesser role due to its size and placement underneath the word 'pinar' in both marks. The device elements will play much lesser roles and the background elements will have negligible impacts.

Visual Comparison

77. Visually, the parties' marks consist of the word 'PINAR'. I do not intend to discuss each and every point of visual difference between the parties' marks as they are

[25] See point one of question eight of the proprietor's counterstatements.

numerous. What I will say, however, is that despite their roles in the overall impressions of the respective marks, they all contribute as points of visual difference. In my view, the shared use of the dominant (or equally dominant) word 'PINAR' in both parties' marks is clearly a point of similarity, despite their differing presentations. This is particularly the case given its dominant role in the contested marks and equally dominant role in the applicant's second mark. That being said, the numerous differences in each mark reduce any visual similarity between them quite considerably. Overall, I am of the view that both contested marks are similar to between a low and medium degree with the applicant's second mark.

Aural Comparison

78. In considering the aural element of the applicant's second mark, I am of the view that consumers will pronounce it as 'PINAR GO'. As for the contested marks, I have given consideration to whether consumers would pronounce 'KURUYEMIS' or not. I appreciate that a significant proportion of consumers may seek to pronounce it, however, I am of the view that an equally significant proportion would not. I say this because (1) it is presented a lot smaller, and below, 'pinar' and (2) UK consumers are, in my view, likely to initially struggle with the pronunciation of 'KURUYEMIS' so will, therefore, not seek to articulate it. In accordance with *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, it is upon the latter group of consumers that I will focus my assessment. I do so because, in that case, Kitchin LJ set out that if a court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then it may properly find infringement. While this related to an infringement case, it applies equally to Tribunal proceedings under section 5(2)(b). Therefore, if I find that the consumers who do not pronounced 'KURUYEMIS' are confused then I am entitled to find that the application based on the section 5(2)(b) ground succeeds.

79. As a result of what I have said above, the comparison at issue here is between 'PINAR GO' and 'PINAR'. Regardless of how 'PINAR' is pronounced by the consumer (be that as 'PEE-NAR' or 'PIN-AR'), it will be identical across both

parties' marks. Further, it is the beginning element of both marks, being that part of marks that consumers tend to focus on.[26] The word 'GO' in the applicant's second mark is clearly a point of aural difference but is just one syllable in length. Overall, I am of the view that the shared use of 'PINAR' results in the marks being aurally similar to between a medium and high degree.

Conceptual Comparison

80. The proprietor's evidence sets out that 'PINAR' is Turkish and means 'spring' or 'fountain'[27] and that 'KURUYMIS' is Turkish for 'nuts'.[28] While I do not doubt that this is the case, I have nothing to suggest whether this would be understood by consumers in the UK.[29] I appreciate that some people who are familiar with the Turkish language would know it, however, it is my understanding that Turkish is not a widely understood language in the UK. Without anything to suggest otherwise, I am not willing to infer that those who understand these meanings form a significant proportion of average consumers. As a result, I find that both 'PINAR' and 'KURUYEMIS' will have no obvious meaning to the majority of UK consumers who will, instead, view them as either foreign language or made-up words.

81. As for the applicant's second mark, I am of the view that the same concept as discussed above in respect of the word 'PINAR' will apply here also. As for the word 'GO', I consider that this will be a readily understood English language word. In my view, 'GO' is not descriptive of the goods at issue but alludes to the fact that the goods offered under the mark are items that are selected for consumption *on the go*.[30]

[26] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02
[27] See Annex 1 of the witness statement of Mr Karapinar.
[28] See Annex 2 of the witness statement of Mr Karapinar. It is noted that the witness statement spells the word as 'KUREYEMIS' but Annex 2 shows the wording in line with how it is used in the contested marks.
[29] On this point, the submissions of the proprietor seem contradictory to its pleaded position. As above, the proprietor argues that 'PINAR' is less distinctive because it means 'spring' but remained silent in respect of 'KURUYEMIS'. However, as discussed here, it has adduced evidence that 'KURUYEMIS' means 'nuts'. If understood, this would clearly be directly descriptive of some of the proprietor's goods. While I do not consider this point is of any impact here (as neither word will be understood), it is point that I have highlighted to show the proprietor's inconsistent pleadings/submissions.
[30] On this point, I appreciate that the goods at issue are not usually considered when assessing the conceptual comparison of marks (see *EMILIANA*, Case BL O/052/22). However, in the present case, I consider that consumers would make this association in light of the nature of the goods at issue many being snack like goods.

82. In comparing the marks, the shared use of the word 'PINAR' is a point of conceptual neutrality given its unknown meaning. Further, even though 'KURUYEMIS' in the contested marks has no counterpart in the applicant's mark, it is a point of conceptual neutrality because, like 'PINAR', it carries no meaning. As for the word 'GO' in the applicant's second mark, as this can be attributed a meaning, it acts as a slight point of conceptual difference between the marks.

Distinctive character of the applicant's second mark

83. 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-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51)."

84. Registered trade marks possess varying degrees of inherent distinctive character, perhaps lower where a mark may be suggestive or allusive of a characteristic of the goods or services for which it is registered, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. In the present case, the applicant has filed evidence of use that would ordinarily be considered here. However, the evidence before me points to use of the 'PINAR' mark and not the applicant's second mark.[31] Therefore, I only have the inherent position to consider.

85. As discussed above, 'PINAR' will be understood as either a foreign language or made-up word with no obvious meaning to the majority of UK consumers. As a result, the word cannot be said to have any descriptive or allusive qualities. It is, therefore, high in inherent distinctive character. As for the word 'GO', this will, in the context of the goods at issue, allude to a range of food products that are for consumption on the go. As a result, I do not consider that 'GO' will contribute to the distinctiveness of the applicant's second mark beyond that which already vests in the word 'PINAR'. As for the stylistic and figurative elements, I am of the view that while they are numerous, they do little to impact upon the mark to a sufficient degree, particularly given the already high degree of distinctiveness that lies in the word 'PINAR'. To confirm, I am of the view that the applicant's second mark enjoys a high level of inherent distinctiveness.

Honest concurrent use

86. I note that in its evidence, the proprietor made reference to its turnover in the UK since 2011. I appreciate that in proceedings before the Tribunal, such evidence is capable of being used to support a defence that there has been honest concurrent use of the marks at issue and, as a result, any likelihood of confusion may be

[31] I appreciate that the second mark was not subject to proof of use so was not considered above. However, I will say, for the avoidance of doubt that while the evidence consists of the use of 'PINAR' in the same way it is used in the applicant's second mark, there is no mention of the word 'GO'. As 'GO' forms a distinctive part of the applicant's second mark, its omission not only alters the distinctive character of the mark but also means that use of 'PINAR' solus is not use of the applicant's second mark as registered.

diminished. While noted, the proprietor did not actively plead such a defence.[32] This, in my view, would be a sufficient reason to dismiss the claim. That being said, I will consider the point briefly here.

87. I remind myself that in order for such a defence to succeed, the evidence must demonstrate that two separate entities have co-existed for a long period of time.[33] In the present case, the evidence covers use of the contested marks in the UK in respect of seeds, dried fruits, peanuts, corn, chips, peanuts and other types of nuts. The use spans over eight years between 2011 and the relevant date of 4 December 2019. On this point, I appreciate that 8 years is not an insignificant amount of time, however, it is not demonstrative of longstanding use. Further, I note that the highest level of turnover provided during this time is €97,241 in 2018 which, in the context of the market at issue, is low. Additionally, there is no evidence that demonstrates that the marks at issue ever came into conflict during this time. For example, there is no evidence that the goods of the parties were made available to consumers via the same trade channels to give rise to circumstances where they would be viewed alongside each other. The evidence is, therefore, of no assistance in giving rise to a defence of the existence of honest concurrent use. As a result, the proprietor's reliance upon this defence is dismissed.

Likelihood of confusion

88. 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 the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the

[32] It is noted that at point two of question eight of the proprietor's counterstatement it states that co-existence is possible (due to the difference between the marks) but this is not to be taken as a defence that the marks at issue have already peacefully co-existed on the mark prior to the relevant dates.
[33] See the principles set out in *Victoria Plum Ltd v Victorian Plumbing Ltd* [2016] EWHC 2911 (Ch), wherein Carr J. considered the CJEU's judgment in *Budejovicky Budvar NP v Anheuser-Busch Inc.* and the Court of Appeal's judgments in that case and in *IPC Media Ltd v Media 10 Ltd,* [2014] EWCA Civ 1403

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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the applicant's second mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact 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 that he has retained in his or her mind.

89. I have found the parties' goods to be identical or similar to either high or at least medium degrees. I have found the average consumer for the goods to be members of the general public at large who will, for the most part, select the goods after having paid a medium degree of attention. However, I have found that some goods will be more casual purchases that will attract a lower degree of attention. The selection process will be primarily visual, though I do not discount an aural component playing a role. In respect of the similarity of the marks at issue, I have found them to be visually similar to between a low and medium degree and aurally similar to between a medium and high degree. As for the conceptual similarity, I have found that while the marks have a point of conceptual dissimilarity in the presence of the word 'GO', their use of 'PINAR' and 'PINAR KURUYEMIS' are points of conceptual neutrality. I have found that the applicant's mark is inherently distinctive to a high degree.

90. Taking all of the above into account and even bearing in mind the principle of imperfect collection, I am of the view that consumers will be able to accurately recall which mark was which. While I appreciate that consumers will note the shared use of the word 'PINAR', I am of the view that they would remember that one mark included the very large word 'GO' and that the other did not. Further, the figurative points of difference, while playing lesser roles, are numerous and are likely to assist in the consumers' accurate recollection of the marks. Consequently, I do not consider that there is a likelihood of direct confusion, even on identical goods that may be selected with a lower degree of attention.

91. I turn now to consider indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

> "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'.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).
>
> (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

92. Further, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at paragraph 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 LJ 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.

93. Upon being confronted by the parties' marks, I consider it likely that the consumer will believe that the marks at issue originate from the same or economically connected undertakings. I appreciate that the marks are visually similar to between a low and medium degree, however, I am of the view that this finding applies for a number of reasons. First, I am of the view that regardless of the presence of all of the other elements within the marks (and even ignoring their respective roles in the marks), the consumer will view 'PINAR' as the indicator of origin for both parties' marks. This element is highly distinctive and consumers will, therefore, believe that only one undertaking would use it. In turn, this would lead them to believe that the marks originate from the same undertaking. Second, the word 'GO' in the applicant's second mark will, when viewed in conjunction with the word 'PINAR', be understood as a reference to a sub-brand of 'PINAR' that produces and sells quick, ready to eat snacks or meals that are for consumption *on the go*. Therefore, it is plausible that consumers will view the applicant's second mark as sub-brand of the contested marks.[34] Lastly, I am of the view that the stylistic differences between the marks will simply be viewed as alternative marks used by the same

[34] See *Colloseum* (cited above), regarding "wrong way round confusion", referring to *Comic Enterprises* (also cited above) at paragraphs 75-84. In that case Kitchin LJ explained that "right way round" or "wrong way round" confusion may be a consequence of nothing more meaningful than the order in which the consumer happened to come across the mark and the sign. He explains further that in both instances the consumer thinks that the goods or services in issue come from the same undertaking or economically linked undertakings, and they may be equally damaging to the distinctiveness and functions of the mark.

undertaking. Taking all of this into account and even bearing in mind the comments of Mr Mellor Q.C. and Arnold LJ in the preceding paragraph, I find that there exists a likelihood of confusion between the marks.

Section 5(3)

94. Section 5(3) of the Act states:

> "5(3) A trade mark which –
>
> is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark."

95. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors,* Case 252/07, *Intel,* Case C-408/01, *Adidas-Salomon,* Case C-487/07, *L'Oreal v Bellure,* Case C-323/09, *Marks and Spencer v Interflora,* Case C383/12P, *Environmental Manufacturing LLP v OHIM.* The law appears to be as follows:

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors, paragraph 24.*

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; G*eneral Motors, paragraph 26.*

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon, paragraph 29* and *Intel, paragraph 63.*

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68;* whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79.*

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77* and *Environmental Manufacturing, paragraph 34.*

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74.*

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a

characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the holder of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure).*

96. The conditions of section 5(3) are cumulative. Firstly, the applicant must show that the marks are similar. Secondly, the applicant must show that its marks have achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established that the level of reputation and the similarities between the parties' marks will cause the public to make a link between them, in the sense of the earlier marks being brought to mind by the contested marks. Finally, assuming the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

97. I am of the view that I can deal with this ground swiftly. I say this because, in my view, the evidence filed is not sufficient to warrant a finding that the applicant enjoys a reputation in any of its marks. Firstly, the only mark covered by the evidence is the applicant's first mark which is a UK mark and, therefore, for any reputation to exist in that mark, it must be based on the knowledge of the UK consumer. This is a significant issue for the applicant as the UK use shown in evidence before me is

not sufficiently solid enough to warrant a finding that the consumer would be aware of the mark. I appreciate that the evidence I have summarised at paragraphs ## to ## above was sufficient to give rise to a finding of genuine use, however, the requirement for a finding of a reputation is considerably more onerous. I say this on the basis that use need not be quantitatively significant in order for it to be genuine. On the contrary, a finding of a reputation requires a level of knowledge of the mark amongst a significant section of the public. In the present case, the turnover provided covers European and UK use and there is no way for me to determine how much of it is attributable to UK use. Further, I appreciate that the invoice evidence provided was sufficient to get the applicant over the line for genuine use, however, I do not consider that this is the case here. On the point of the invoice evidence, I remind myself that there are 144 invoices and if the applicant was intent on relying on this evidence to prove a reputation, it should have provided a breakdown of the same. In the circumstances, I do not consider it appropriate (or fair to the proprietor) for me to conduct such a detailed assessment on the applicant's behalf. Again, I appreciate that this was not an issue for genuine use, however, it is here.

98. As for the remaining evidence, I do not consider that it is sufficient to overcome the above issue. I say this because the evidence as to advertising and marketing, while noted, is not particularly compelling. On this point, I remind myself that the evidence relates to just one attendance at an exhibition in 2017 and while this is likely to have resulted in some sales and exposure of the applicant's brand, there is nothing to suggest how much. As for the social media evidence, while I appreciate that it is UK targeted and shows activity from prior to the relevant date for this assessment (being 4 December 2019), it has attracted either a very limited level of engagement or no engagement whatsoever. As such, I am unable to pin a finding that these efforts have resulted in the applicant obtaining a widespread knowledge in its mark.

99. Taking all of this into account, I am not willing to find that the applicant has proven that it enjoys a reputation amongst a significant part of the public in the UK. Therefore, the application based on section 5(3) hereby fails.

CONCLUSION

100. The applications against both contested marks have succeeded in full under the section 5(2)(b) ground. As a result, and subject to any successful appeal of this decision, the contested marks are hereby declared invalid and are deemed as if they had never been registered.

COSTS

101. As the applicant has succeeded, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of £1,500 as a contribution towards its costs. The sum is calculated as follows:

Filing two invalidation applications and considering the counterstatements of the proprietor:	£400
Preparing evidence:	£600
Written submissions:	£300
Official fees:	£200
Total:	**£1,500**

90. I hereby order PINAR KURUYEMIS GIDA VE IHTIYAÇ MADDELERI SANAYI TICARET ANONIM SIRKETI to pay Yadex International GmbH the sum of £1,500. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 29th day of July 2024

A COOPER

For the Registrar

ANNEX

The applicant's first mark

Class 29

Dried, preserved, canned and cooked fruit and vegetables; fruit and vegetable jellies; jams; eggs; milk; milk products and dairy products; butter, cheese, cream, yoghurt, powdered milk for alimentary purposes; edible oils and fats; fruit and vegetable preserves; all included in Class 29.

The applicant's second mark

Class 29

Apple purée; apple sauce; flavored yoghurts; flavored milk; flavored milk beverages; flavored powdered milk for the preparation of beverages; yoghurt-based beverages; spreads from dairy products; organic milk; spreads of vegetable origin; butter; butter cream; buttermilk; milk-based desserts; dairy desserts; soured milk; soured milk [curd]; dips [dairy products]; milk-based dips; canned fruit; drinks made from yoghurt; dulce de leche [milk creams]; pickled fruits; pickled fish; pickles; pickled fruit; canned vegetables; ice cream shakes; fermented milk; low fat spreads from dairy products; low-fat yoghurts; fruit desserts; fruit jellies; fruit-based milk drinks; fruit preserves; fruit jams; fruit juices for cooking; jellies and gelatines, except meat and fish jellies and gelatines, preserves, compotes, fruit and vegetable spreads; vegetables, frozen; grilled vegetables; cooked fruit; cooled milk-based desserts; jellies, except meat and fish jellies; vegetables [cooked]; vegetables [dried]; vegetables [preserved]; vegetable jellies; tinned vegetables [cans]; vegetable mousses; vegetables pastes; dried fruits; dried fruit; milk-based beverages; drinks made of milk or milk-containing beverages; drinks made of thickened milk [yoghurts]; frozen ready meals consisting mainly of vegetables; yoghurt; yoghurt desserts; yoghurt drinks; coffee whiteners consisting mainly of dairy products; cheese; cheese dips; cheese substitutes; cheese mixtures; cheese powder; cheese sticks; milk; milk creams [yoghurts]; milk-based milk beverages; milk drinks with chocolate flavour; milk beverages, milk predominating; dairy products; powdered milk; powdered milk for food purposes; milkshakes; non-

ripened fresh cheese; curd cheese; rice milk [milk substitutes]; cream [cream]; milk-based whipped cream; soymilk [milk substitute]; edible oils and fats; tinned tomatoes; tomato paste; tomato purée; processed cheese; grated cheese ready for consumption; white cheese.

Class 30

Beverages made from cacao; confectionery molded from chocolate; bakery products; bread, biscuits; crackers with cheese flavour; iced lollies with milk; ice cream, non-dairy; pastries; pastries with vegetable fillings; rice-based ready meals; ready meals made from pasta; ready meals in the form of pizza; frozen pastry; frozen dairy confectionary; toasted cheese sandwich; cereal preparations; tea-based beverages; chocolate-based beverages with milk; coffee, tea, cocoa and substitutes therefor; cocoa drinks; cocoa beverages; beverages containing cacao; cocoa powder; biscuits for human consumption with cheese; ketchup; confectionary with milk; flour-based confectionery; confectionery coated with chocolate; confectionery with sugar icing; cheese balls [snack]; cheese puffs; cheesecake; cheese curls [snack]; cheese macaroni; cheese sauce; flour; milk sweets; milk pudding for food purposes; dairy ice cream bars; coffee beverages containing milk; milk coffee; milk cocoa; rice pudding; milk chocolate; milk chocolate [drink]; milk chocolate bars; dairy ice cream; crackers stuffed with cheese; pudding; curd cake; salad dressings; milk-based chocolate; chocolate drinks; chocolate beverages with milk; nutritious chocolate beverages, not milk or plant-based; mustard; sorbets [edible ice]; edible ice; biscuits with milk chocolate; tea beverages; tomato ketchup / tomato ketchup; packaged food consisting of rice with vegetables; ready-to-eat desserts [pastry]; ready-to-eat desserts [confectionery]; cocoa drinks and cocoa-based beverages ready for consumption; seasonings; sugar, honey, treacle; packed lunch meals mainly consisting of rice with vegetables.

Class 32

Non-alcoholic fruit beverages; non-alcoholic beverages; fruit beverages and fruit juices; fruit nectars; fruit juice beverages; vegetable juices [beverages]; lemonades; milk of almonds [beverage], peanut milk [non-alcoholic beverage], coconut milk [beverage]; mineral waters [beverages]; whey beverages; rice-based beverages, other

than milk substitutes; syrups for beverages; soya-based beverages, other than milk substitutes; tomato juice [beverages]; waters [beverages].

The applicant's third mark

Under section 5(2)(b) only:

Class 29

soured milk; *dips [dairy products]*; cream cheese; cheese; *cheese dips*; white cheese; hard cheese; cheese mixtures; milk products; dairy products.

Under section 5(3) only:

Class 29

Milk-based desserts; cream cheese; yoghurt; yoghurt drinks; cheese; white cheese; hard cheese; cheese mixtures; milk; milk creams [yoghurts]; drinks made of milk or milk-containing beverages; milk products; dairy products.

Class 32

Non-alcoholic fruit beverages; non-alcoholic beverages; fruit juice beverages; fruit juices.