

O/0638/23

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

TRADE MARK REGISTRATION No. 3489044  
IN THE NAME OF RAW IS MORE LTD.  
IN RESPECT OF THE FOLLOWING TRADE MARK:

**GROUND**

IN CLASSES 5, 29, 30 & 32

AND

AN APPLICATION FOR DECLARATION OF INVALIDITY  
THERE TO UNDER NO. 504099 BY GROUNDED FOODS CO.

AND

IN THE MATTER OF TRADE MARK APPLICATION  
TRADE MARK REGISTRATION No. 3683486  
IN THE NAME OF RAW IS MORE LTD.  
TO REGISTER AS A TRADE MARK:

**GROUND<sup>®</sup>**

IN CLASSES 5, 29, 30 & 32

AND

OPPOSITION THERETO  
UNDER NO. 430533 BY GROUNDED FOODS CO.

## BACKGROUND & PLEADINGS

1. RAW IS MORE LTD. is the owner of the following UK trade mark with registration number 3489044:

### GROUNDED

The mark was applied for on 12 May 2020 in the United Kingdom and completed its registration procedure on 18 September 2020. The application for invalidation under No. 504099 concerns some of the goods for which the contested mark stands registered as follows:

**Class 5:** Pharmaceutical preparations and substances; Dietary food preparations; Natural healthcare preparations and substances; Food supplements; Protein powder dietary supplements; Powdered plant-based protein dietary supplements; Plant-based protein dietary supplements in powder form; Fortified beverages; Health supplements.

**Class 29:** Dairy product substitutes; Milk substitutes; Milk substitutes containing oats; Milk substitutes based on coconut as a main ingredient; Coconut milk based milk shakes; Oat milk (milk substitute); Milk substitute based beverages; Oat-based beverage for use as a milk substitute; Coconut-based beverages for use as a milk substitute; Beverages and beverages based on milk replacements [predominantly milk replacements]; Almond milk, almond milk based drinks; Coconut milk; Coconut milk based drinks; Cheese dips; Plant-based cheese dips; Bean dips; Coconut milk based milk shakes; Plant-based milk alternatives milk shakes; Hemp milk used as a milk substitute; Peanut milk; Peanut milk based drinks; Rice milk; Rice milk for use as a milk substitute; Soya milk; Soya milk; Soya milk; Functional food beverages such as milk replacement; Oat based drinks with fruit flavour; Milk substitute-based drinks containing coffee; Yogurt replacements; Yogurt substitutes containing coconut milk as a


base; Milk replacer preparations for making yogurt; Coconut-based yogurt and drinking yogurt free from milk and lactose; Yogurt replacements and drink yogurt replacements containing coconut extracts; Cheese products from dairy product substitutes; Cheese mix of dairy product substitutes; Cheese substitutes; Plant-based cheese products; Coconut milk powder; Peanut butter; Cashew butter; Almond butter; Pistachio butter; Milk shakes; Bases for making milk shakes; Mixtures for making milk shakes; Preparations for making milk shakes; Flavoured protein enriched milk shakes; Flavoured plant-based protein enriched milk shakes; Mocha flavoured plant-based milk shakes; Flavoured plant-based milk shakes; Protein enriched milk shakes; Powders for making milk shakes; Edible fats for making milk shakes; Insect-based preparations for making milk shakes; Insect larvae based preparations for making milk shakes; Milk products in paste form for making milk shakes; Milk products in powder form for making milk shakes; Coconut-based and vegetable-based milk replacement products for weight loss purposes; Plant-based nutritional beverage mixer [milk substitutes]; Plant-based nutritional drinks in the form of vitamin and mineral drinks [milk substitutes]; Probiotic dairy-based snack bars; Probiotic milk substitute based snack bars; Probiotic yoghurt-based snack bars; Probiotic yogurt-based snack bars.

**Class 30:** Cakes; Bakery products and bakery goods; Bakery desserts; Prepared desserts; Grab & go bakery goods; Grab & go cake bars; Grab & go cake slices; Grab & go Cake bars; Individually packaged cake slices; High protein cake bars; High protein flavoured cake slices; High protein individual cake bites; High protein cakes; Protein-enriched cakes; Protein-enriched bakery products; Protein-enriched baked goods; Low-sugar cakes; Low-sugar cake bars; Low-sugar cake bites; Food dressings [sauces]; Sauces; Cooking sauces; Prepared foods in the form of sauces; Ice cream substitute; Ice cream, ice cream made on milk substitutes; Dairy cream substitute; Frozen yogurt made on milk substitutes; Frozen yogurt by dairy substitute.

- On 19 August 2021, RAW IS MORE LTD applied to register the following mark in the United Kingdom:

**GROUND<sup>®</sup>ED**

- The application was published on 26 November 2021. The opposition proceedings under No. 430533 concern the exact same goods as in paragraph 1 of this decision.
- Grounded Foods Co. opposes the above application and also applied to have the UKTM No. 3489044 declared invalid. Both actions are based on the provisions of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), which are relevant in invalidation proceedings under Section 47 of the Act, and the following trade mark:

<b>Trade Mark no.</b>	UK00918271273
<b>Trade Mark</b>	
<b>Goods Relied Upon</b>	<b>Class 29:</b> Plant-based cheese and cheese-based snack foods.
<b>Relevant Dates</b>	Filing date: 10 July 2020
	Date of entry in register: 01 December 2020
<b>Priority details</b>	Priority date: 10 January 2020 Priority country: United States of America TM from which priority claimed: 88753777

- Under Section 6(1) of the Act, the above trade mark clearly qualifies as an earlier trade mark. Further, it had not completed its registration procedure more than five years before the date of the application for invalidation (or the date on which the contested mark was filed), and so the earlier trade

mark is not subject to the proof of use provisions contained in Sections 47(2A) – (2E) of the Act.

### **Grounded Foods Co. Statement of Grounds**

6. In its application for invalidation, Grounded Foods Co. claims the following:

“The mark in UK registration no. 3489044 ('44) is the word GROUNDED which is aurally and conceptually identical to the stylised word GROUNDED in the 918271273 ('73) registration, and visually highly similar. As such, the mark in the '44 registration is highly similar to the mark in the '73 registration. The goods in the '44 registration, as set out in Q4 above, that are dairy products, made from dairy, are substitutes for dairy products, or are made from substitutes of dairy products are identical and/or similar to the goods protected in the '73 registration.

Due to the similarity of the marks, and the identity and similarity of the goods, there exists a likelihood of confusion on the part of the public. As such, the '44 registration should be cancelled under the provisions of Section 5(2)(b).”

7. In its notice of opposition, Grounded Foods Co. asserts that:

“The dominant and distinctive element of the mark in the Application is the word GROUNDED and the dominant and distinctive element of the Opponent's trade mark is also the word GROUNDED. Both marks have an element of stylisation, however, this stylisation is not dominant and will only marginally reduce the visual similarity, and have no effect on the aural and conceptual similarity. As such, the mark in the Application is visually, aurally and conceptually highly similar to the Opponent's trade mark.

The goods in the Application, as set out in Q4 above, are dairy products, made from dairy products, substitutes for dairy products, or

are made from substitutes for dairy products which are identical and/or similar to the goods protected by the Opponent's trade mark.

Due to the similarity of the marks, and the identity and similarity of the goods, there exists a likelihood of confusion on the part of the public. As such, the Application should be refused registration under the provisions of Section 5(2)(b).”

### **RAW IS MORE LTD Defence**

8. RAW IS MORE LTD filed notices of defence in each case.
9. In relation to the application for invalidation, RAW IS MORE LTD denied similarity between the competing marks in the following terms:

“11. In turning to the Opponent's claim that the mark is visually or conceptually and phonetically similar, while the word element may be deemed to be similar, the mark should not be isolated in such a way and when one mark is compared to another mark, this should be done through looking at the two marks as a whole. For this reason, when looking at the marks as a whole, it is unreasonable for a consumer to look at the Opponent's mark and confuse or deduce that the Opponent and Defendant are all related to and come from the same commercial undertaking given that the Opponent's mark is so highly stylised as to allow for it to have its own uniqueness by virtue of the presence of a leaf emblazoned on its mark.

12. The Defendant does not believe that the marks are similar, nor do the marks cut across the exact same set of goods and therefore the cancellation proceeding should not be permitted.”

10. Similarly, in relation to the opposition, RAW IS MORE LTD denied any similarity between the marks, asserting that:

“10. [...] while the word element may be deemed to be similar, the mark should not be isolated in such a way and when one mark is

compared to another mark, this should be done through looking at the two marks as a whole. For this reason, when looking at the marks as a whole, it is unreasonable for a consumer to look at the Opponent's mark and confuse or deduce that the Opponent and Defendant are all related to and come from the same commercial undertaking given that the Opponent's mark is so highly stylised as to allow for it to have its own uniqueness by virtue of the presence of a leaf emblazoned on its mark. [...]

14. The Defendant maintains that the registered mark in their name would not cause confusion amongst consumers, and contrary to s5(2), does not believe that the marks are similar so far as to cause confusion to the consumer.”

### **Representation**

11. In these consolidated proceedings, Grounded Foods Co. is represented by Dolleymores and RAW IS MORE LTD is represented by Trademark Brothers Ltd.
12. Although the UK has left the EU, Section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

## **Evidence**

13. Only Grounded Foods Co. filed evidence in these proceedings. The evidence comes from Christopher Lewis, a Chartered Trade Mark Attorney at Saunders & Dolleymore LLP (Dolleymores), the representative of Grounded Foods Co. , and is dated 21 March 2022. It is accompanied by 2 Exhibits demonstrating the results of internet research in relation to a wide range of vegan products, including plant-based cheese goods, sold by large third-party online supermarkets/ traders.
14. I have read and considered all of the evidence, and it must be noted that the evidence filed, demonstrating the goods of third parties, is irrelevant to the decision before me. This is because I must make my decision based on the fair and notional use of the marks for the terms that appear in the specifications.

## **The Hearing and Preliminary Issues**

15. The matter came to be heard by me via video conference on 24 April 2023. RAW IS MORE LTD was represented by Mr Mo Abbas, instructed by Trademark Brothers Ltd., Grounded Foods Co. did not attend the hearing.
16. At the start of the hearing, there was a preliminary issue that needed to be addressed. This pertained to the evidence that RAW IS MORE LTD sought to adduce into the proceedings after multiple attempts. Mr Abbas argued that his witness statement adhered to the rules, yet the Registry did not admit it into the proceedings. However, I noted that the filed witness statement lacked a statement of truth, rendering it inadmissible. The Registry had given a deadline for the filing of an amended witness statement, but none was received. Mr Abbas was confident that the original witness statement was admissible, so I asked him to send a copy of the statement demonstrating that it was filed without the said deficiency. He agreed, and the hearing was temporarily adjourned. After reviewing the file, I resumed the hearing and informed Mr Abbas that the witness

statement provided fell short of the requirements. Consequently, I refused to admit it.

17. Subsequently, Mr Abbas emphasised that in various instances RAW IS MORE LTD proposed to Grounded Foods Co. to remove the overlapping terms, including cheese products, from the contested specifications in order for them to reach a settlement. He clarified that RAW IS MORE LTD has had no intention to produce any plant-based cheese or cheese-based snack food products. However, he stressed that the negotiations reached an impasse in the following terms:

“[...] they [Grounded Foods Co. ] were a bit more over-zealous in their approach in try and bring this matter to a conclusion, by asking us to remove a lot more than our clients were able to do [...]. The fact of the matter is that their classification description is so limited. Our clients are happy to remove those goods today. If we do that, I do not know what it means technically. I have seen oppositions and cancellations not go any further once those goods have been removed. However, it depends if there is an argument for complementary goods, which I do not believe there is, to be frank.”<sup>1</sup>

18. Given the submissions made, I invited Mr Abbas if he would prefer to offer a fall-back specification for consideration. At first, he seemed unsure and did not provide a definitive answer. Thus, I assured him that I would return to this point before concluding the hearing. Towards the end of the hearing, Mr Abbas confirmed that he would be willing to file a fall-back specification. I, therefore, informed Mr Abbas that I would give him seven days to file this before allowing the other party to make comments on it. I will return to this point at the end of this decision.

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<sup>1</sup> Page 8 of the transcript.

## DECISION

### Legislation

19. Section 5(2)(b) of the Act states:

“A trade mark shall not be registered if because-

[...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

20. Section 47 of the Act states that:

“[...]

(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) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[...]

(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.

[...]

(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.”

21. The invalidation application is based specifically on Section 5(2)(b) of the Act.
22. The principles considered in these proceedings stem from the decisions of the European 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 BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (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-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

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

### **Comparison of the Goods at Issue**

23. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In *Canon Kabushiki Kaisha*, the Court of Justice of the European Union (CJEU) stated that:

“23. In assessing the similarity of the goods or services concerned [...], all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or complementary.”

24. Guidance on this issue was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] RPC 281. At [296], he identified the following relevant factors:

- “(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.”

25. The General Court (GC) confirmed in *Gérard Meric v OHIM*, Case T-133/05, paragraph 29, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another, or vice versa:

“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 für 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”.

26. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold set out the following summary of the correct approach to interpreting specifications:

“[...] the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

27. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), paragraph 12, Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

“[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

28. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU held that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The GC clarified the meaning of “complementary” goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06, at paragraph 82:

“[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way

that customers may think that the responsibility for those goods lies with the same undertaking.”

Preferred approach

29. As both proceedings concern the same competing goods in the specifications, expressed in the exact same terms, I will proceed with a single assessment that will be applicable to both of them.

30. The competing goods to be compared are shown in the following table:

<b>Grounded Foods Co.’s Goods</b>	<b>RAW IS MORE LTD’s Goods</b>
<p><b>Class 29:</b> Plant-based cheese and cheese-based snack foods.</p>	<p><b>Class 5:</b> Pharmaceutical preparations and substances; Dietary food preparations; Natural healthcare preparations and substances; Food supplements; Protein powder dietary supplements; Powdered plant-based protein dietary supplements; Plant-based protein dietary supplements in powder form; Fortified beverages; Health supplements.</p> <p><b>Class 29:</b> Dairy product substitutes; Milk substitutes; Milk substitutes containing oats; Milk substitutes based on coconut as a main ingredient; Coconut milk based milk shakes; Oat milk (milk substitute); Milk substitute based beverages; Oat-based beverage for use as a milk substitute; Coconut-based beverages for use as a milk substitute; Beverages and beverages based on milk replacements [predominantly milk replacements]; Almond milk, almond milk based drinks; Coconut milk; Coconut milk based drinks; Cheese dips; Plant-based cheese dips; Bean dips; Coconut milk based milk shakes; Plant-based milk alternatives milk</p>

	<p>shakes; Hemp milk used as a milk substitute; Peanut milk; Peanut milk based drinks; Rice milk; Rice milk for use as a milk substitute; Soya milk; Soya milk; Soya milk; Functional food beverages such as milk replacement; Oat based drinks with fruit flavour; Milk substitute-based drinks containing coffee; Yogurt replacements; Yogurt substitutes containing coconut milk as a base; Milk replacer preparations for making yogurt; Coconut-based yogurt and drinking yogurt free from milk and lactose; Yogurt replacements and drink yogurt replacements containing coconut extracts; Cheese products from dairy product substitutes; Cheese mix of dairy product substitutes; Cheese substitutes; Plant-based cheese products; Coconut milk powder; Peanut butter; Cashew butter; Almond butter; Pistachio butter; Milk shakes; Bases for making milk shakes; Mixtures for making milk shakes; Preparations for making milk shakes; Flavoured protein enriched milk shakes; Flavoured plant-based protein enriched milk shakes; Mocha flavoured plant-based milk shakes; Flavoured plant-based milk shakes; Protein enriched milk shakes; Powders for making milk shakes; Edible fats for making milk shakes; Insect-based preparations for making milk shakes; Insect larvae based preparations for making milk shakes; Milk products in paste form for making milk shakes; Milk products in powder form for making milk shakes; Coconut-based and vegetable-based milk replacement products for weight loss purposes; Plant-based nutritional beverage mixer [milk</p>
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	<p>substitutes]; Plant-based nutritional drinks in the form of vitamin and mineral drinks [milk substitutes]; Probiotic dairy-based snack bars; Probiotic milk substitute based snack bars; Probiotic yoghurt-based snack bars; Probiotic yogurt-based snack bars.</p> <p><b>Class 30:</b> Cakes; Bakery products and bakery goods; Bakery desserts; Prepared desserts; Grab &amp; go bakery goods; Grab &amp; go cake bars; Grab &amp; go cake slices; Grab &amp; go Cake bars; Individually packaged cake slices; High protein cake bars; High protein flavoured cake slices; High protein individual cake bites; High protein cakes; Protein-enriched cakes; Protein-enriched bakery products; Protein-enriched baked goods; Low-sugar cakes; Low-sugar cake bars; Low-sugar cake bites; Food dressings [sauces]; Sauces; Cooking sauces; Prepared foods in the form of sauces; Ice cream substitute; Ice cream, ice cream made on milk substitutes; Dairy cream substitute; Frozen yogurt made on milk substitutes; Frozen yogurt by dairy substitute.</p>
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31. Grounded Foods Co. has not made any specific contentions as to the similarity or identity between the competing goods.
32. Mr Abbas submitted that “the core of the goods that our client functions in is plant-based alternative milk protein shakes.”<sup>2</sup> He also posited that “[o]ur client has no intention of doing plant-based cheese products or

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<sup>2</sup> Page 7 of the transcript.

plant-based cheese dips or whatever it is that the person bringing the cancellation forward is functioning in.”<sup>3</sup>

33. In addition, for RAW IS MORE LTD , Mr Abbas admitted high similarity between some of the competing goods by submitting that:

“In our classification description as it stands at the moment, [...], there is reference specifically to plant-based cheese products, there is reference to cheese substitutes, cheese dips, plant-based cheese dips and cheese products from dairy product substitutes and cheese mix of dairy product substitutes.”<sup>4</sup>

34. Although Mr Abbas provided details as to the area of business of RAW IS MORE LTD , I note that I must consider the matter notionally based on the terms the parties have registered or seek to register.
35. For the purpose of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way for the same reasons.<sup>5</sup>

## **Class 5**

36. There is no obvious similarity between the competing specifications in Class 29 and Class 5. Even where the contested goods are plant-based, they will be mainly available in the form of tablets, capsules or powders fulfilling a dietary/medical purpose as opposed to the earlier goods, which are all foodstuffs that are directly consumed and are intended to satisfy hunger and provide nutrition. As a result, they have a distinct nature and purpose. Moreover, the contested goods will be sold through different

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<sup>3</sup> Ibid.

<sup>4</sup> Page 10 of the transcript.

<sup>5</sup> *Separode Trade Mark* BL O-399-10 and *BVBA Management, Training en Consultancy v BeneluxMerkenbureau* [2007] ETMR 35 at paragraphs 30 to 38.

trade channels, such as specialist stores and pharmacies, instead of supermarkets. They are not in competition or complementary. I find the competing goods to be dissimilar.

## **Class 29**

*Cheese mix of dairy product substitutes; Cheese products from dairy product substitutes; Cheese substitutes; Plant-based cheese dips; Plant-based cheese products; Cheese dips*

37. The term “*Plant-based cheese products*” are identical to the earlier goods “*Plant-based cheese*”, as they are identically worded. In relation to “*Cheese mix of dairy product substitutes; Cheese products from dairy product substitutes; Cheese substitutes; Cheese dips*”, I consider that the contested terms are *Merix* identical to the earlier goods “*Plant-based cheese and cheese-based snack foods*”.

*Dairy product substitutes*

38. The core meaning of the contested term would refer to a variety of plant-based products that do not contain dairy. Against this background, I consider this term to be broad to cover the earlier goods “*Plant-based cheese*”. Thus, I find them to be identical as per *Merix*. If I am wrong in this finding, the competing goods are highly similar, sharing the same nature, purpose, users, and trade channels.

*Probiotic dairy-based snack bars; Probiotic milk substitute based snack bars; Probiotic yoghurt-based snack bars; Probiotic yogurt-based snack bars*

39. The contested terms are either dairy-based or non-dairy snacks ready to eat. The closest comparable term from the earlier specification is “*plant-based [...] cheese-based snack foods*”. The competing goods may share the same purpose, method of use, users, and trade channels. They are

also in competition as the users may choose one over the other. Even in the case where the contested goods differ in nature (dairy v non-dairy), I still find them to be similar to a high degree.

#### Bean dips

40. The contested goods are dipping sauces made of beans. The closest comparable term from the earlier specification is “*plant-based [...] cheese-based snack foods*”. Although they may differ in nature, as the contested goods are dipping sauces and the earlier are not, they coincide in the general purpose, and method of use. Also, the users, and trade channels will overlap. I consider that there is a degree of competition between the goods as the consumers may choose one over the other. I find the goods to be similar to between a low to medium degree.

Coconut milk based drinks; Almond milk, almond milk based drinks; Beverages and beverages based on milk replacements [predominantly milk replacements]; Coconut milk; Coconut milk based milk shakes; Coconut milk based milk shakes; Coconut-based and vegetable-based milk replacement products for weight loss purposes; Coconut-based beverages for use as a milk substitute; Coconut-based yogurt and drinking yogurt free from milk and lactose; Flavoured plant-based milk shakes; Flavoured plant-based protein enriched milk shakes; Flavoured protein enriched milk shakes; Functional food beverages such as milk replacement; Hemp milk used as a milk substitute; Milk shakes; Milk substitute based beverages; Milk substitute-based drinks containing coffee; Mocha flavoured plant-based milk shakes; Peanut milk; Peanut milk based drinks; Plant-based milk alternatives milk shakes; Rice milk; Rice milk for use as a milk substitute; Soya milk; Soya milk; Soya milk; Plant-based nutritional drinks in the form of vitamin and mineral drinks [milk substitutes]; Protein enriched milk shakes; Milk substitutes; Milk substitutes based on coconut as a main ingredient; Milk substitutes containing oats; Oat based drinks with fruit flavour; Oat milk (milk substitute); Oat-based beverage for use as a milk substitute

41. The contested goods consist mainly of milk and milkshakes created from non-dairy sources like plant extracts. I note that the contested goods are broad terms that may well cover ready-to-drink goods that would be sold in supermarkets and off-licence stores. Notably, the contested goods will overlap in general nature with the earlier goods “*plant-based cheese*”. However, I acknowledge that the contested goods will come in a liquid form and are not savoury as the earlier goods. Further, the competing goods are intended for consumption, sharing the same general purpose. The users and trade channels will overlap as they may well be sold from the fridge, potentially close to each other. However, I do not consider that there is any degree of complementarity or competition between them. The competing goods are similar to between a low and medium degree.

*Milk replacer preparations for making yogurt; Yogurt replacements; Yogurt replacements and drink yogurt replacements containing coconut extracts; Yogurt substitutes containing coconut milk as a base*

42. The contested terms are all yoghurt replacement/substitute goods. They will be similar to the earlier “*plant-based cheese*” goods. They will overlap in general nature and purpose (consumption of foodstuffs). Further, they will share the same users and trade channels sold from the fridge as the earlier goods. However, they will not be in competition or have a complementary relationship. I find them similar to between a low and medium degree.

*Almond butter; Cashew butter; Peanut butter; Pistachio butter*

43. The contested goods are all nut-based butter goods. They will share the same general purpose as the earlier goods “*plant-based cheese*” and users. However, the competing goods are sold in separate parts of the supermarket and have different nature. Therefore, they will not be found next to each other, and there is no complementary or competitive relationship among them. I consider the similarities to be too superficial to find any similarity between the goods.

Bases for making milk shakes; Edible fats for making milk shakes; Insect larvae based preparations for making milk shakes; Insect-based preparations for making milk shakes; Milk products in paste form for making milk shakes; Milk products in powder form for making milk shakes; Mixtures for making milk shakes; Plant-based nutritional beverage mixer [milk substitutes]; Powders for making milk shakes; Preparations for making milk shakes; Coconut milk powder

44. These are all preparations or bases for making milk/milkshakes in powder or paste form. The closest comparable term from the earlier specification is “*plant-based cheese*”. I consider the competing goods to be a step further away from the goods in the previous paragraph. The nature will be different (powder/paste form) from the earlier goods. Moreover, they will be found in different areas/aisles of supermarkets or shops away from the earlier goods. Even though they will share the same users, I consider this to be an insufficient factor to find similarity. Thus, they are dissimilar.

### **Class 30**

Dairy cream substitute

45. The contested goods in question are non-dairy products intended for use in cooking or baking. The closest comparable term from the earlier specification is “*plant-based cheese*”. The competing goods will be sold from the fridge, potentially in close proximity to one another but not directly adjacent. Again, in this instance, there is an overlap in users. Also, they may coincide in the method of use (as cooking ingredients). However, they are not in competition or complementary. I find them to be similar to a low degree at best.

Cakes; Bakery products and bakery goods; Bakery desserts; Prepared desserts; Grab & go bakery goods; Grab & go cake bars; Grab & go cake slices; Grab & go Cake bars; Individually packaged cake slices; High protein cake bars; High protein flavoured cake slices; High protein individual cake bites; High protein cakes; Protein-enriched cakes; Protein-enriched bakery products; Protein-enriched baked goods; Low-sugar cakes; Low-sugar cake bars; Low-sugar cake bites

46. The contested goods are all cakes or bakery products that are considered to be treats of some sort. I do not consider that they are similar to the earlier goods. They differ in nature and purpose. Even if they are sold in large supermarkets, they will be found in different areas away from each other. The overlap in users would be too superficial to find similarity. In addition, there is no competition or complementarity. I find the competing goods to be dissimilar.

Food dressings [sauces]; Sauces; Cooking sauces; Prepared foods in the form of sauces

47. Following the same approach of the previous paragraph, I find the contested goods to be dissimilar to the earlier goods.

Ice cream substitute; Ice cream, ice cream made on milk substitutes; Frozen yogurt made on milk substitutes; Frozen yogurt by dairy substitute

48. The contested goods are milk or milk substitute products that are sweet and sold in tubs or containers from the freezer, where the consumer may select a specific flavour and quantity. There are no submissions or evidence to show similarity between the competing goods. The earlier goods are savoury and sold from the fridge or the counter. Therefore, they differ in nature, purpose, trade channels, and they are not complementary or in competition. I find them to be dissimilar.

49. The likelihood of confusion does not arise in relation to the contested goods in Classes 5, 29, and 30 which are dissimilar to the earlier goods.<sup>6</sup> **The claims under section 5(2)(b) cannot succeed against dissimilar goods and, therefore, they are dismissed insofar as they concern the following terms:**

**Class 5:** Pharmaceutical preparations and substances; Dietary food preparations; Natural healthcare preparations and substances; Food supplements; Protein powder dietary supplements; Powdered plant-based protein dietary supplements; Plant-based protein dietary supplements in powder form; Fortified beverages; Health supplements.

**Class 29:** Bases for making milk shakes; Edible fats for making milk shakes; Insect larvae based preparations for making milk shakes; Insect-based preparations for making milk shakes; Milk products in paste form for making milk shakes; Milk products in powder form for making milk shakes; Mixtures for making milk shakes; Plant-based nutritional beverage mixer [milk substitutes]; Powders for making milk shakes; Preparations for making milk shakes; Coconut milk powder; Almond butter; Cashew butter; Peanut butter; Pistachio butter.

**Class 30:** Cakes; Bakery products and bakery goods; Bakery desserts; Prepared desserts; Grab & go bakery goods; Grab & go cake bars; Grab & go cake slices; Grab & go Cake bars; Individually packaged cake slices; High protein cake bars; High protein flavoured cake slices; High protein individual cake bites; High protein cakes; Protein-enriched cakes; Protein-enriched bakery products; Protein-enriched baked goods; Low-sugar cakes; Low-sugar cake bars; Low-sugar cake bites; Food dressings [sauces]; Sauces; Cooking sauces; Prepared foods in the form of sauces; Ice cream substitute; Ice cream,

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<sup>6</sup> Case C-398/07, *Waterford Wedgwood plc v OHIM*; and *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, para 49.

ice cream made on milk substitutes; Frozen yogurt made on milk substitutes; Frozen yogurt by dairy substitute.

### **Average Consumer and the Purchasing Act**

50. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), at paragraph 70, Birss J (as he then was) described the average consumer in these terms:

“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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”

51. Mr Abbas submitted that the UK average consumer will be “a member of the public going into a gym or a supermarket to try and find our client's products. Simple as that. In terms of looking at the guarantee of origin, I think it is the inherent look and feel of our client's products that makes them stand out and the name [...]. [...] Given that it is to do with the supermarket industry or health food shop industry visual is the most important in my view, along with aural.”<sup>7</sup> Mr Abbas refrained from making any submissions as to the degree of attention. I remind myself that I must consider the

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<sup>7</sup> Page 11 of the transcript.

notional and fair use of the marks in relation to all of the goods in respect of which they are registered or seek to register.

52. The goods at issue in Classes 29 and 30 are various food or drink items, all of which would be purchased and consumed by the general public. These are inexpensive goods purchased through primarily visual means, most often selected from supermarket shelves/fridges/freezers or on a website for home delivery. Whilst the average consumer will predominantly purchase them following a visual inspection, I do not discount aural recommendations. Given the low cost of the goods, the level of care and attention paid when purchasing them will be no more than average.

### **Comparison of Trade Marks**


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

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

54. 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.

55. The marks to be compared are:

Grounded Foods Co.’s Mark	RAW IS MORE LTD’s Marks
	<p><u>Contested Mark 3489044</u></p> <p><b>GROUND</b></p>
	<p><u>Contested Mark 3683486</u></p> <p><b>GROUND<sup>®</sup></b></p>

## Invalidation Proceedings

### Overall Impression

56. The earlier mark consists of the word element “G-ounded” presented in a title case with a device of a seedling replacing the letter ‘r’. The seedling device certainly contributes to the overall impression but will be perceived as a highly stylised replacement for the letter “r”, and the overall impression is of the word Grounded with stylised elements. Thus, the verbal element makes the larger contribution to the overall impression of the mark, with a lesser role played by the stylisation.

57. The contested mark is a word only mark presented in a standard typeface and upper case. Registration of a word mark protects the word itself.<sup>8</sup> The overall impression of the contested mark lies in the word itself.

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<sup>8</sup> See *LA Superquimica v EUIPO*, T-24/17, para 39; and *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17, paragraph 16.

### Visual comparison

58. Mr Abbas submitted that there is no visual similarity between the competing marks, positing that:

“[...] the marks are completely separate in the sense that one is a figurative mark and the other is a word mark. Our view of that is first of all you cannot describe a figurative mark that is using a very distinctive leaf or image, I suppose, as part of their mark so you cannot read that as a consumer, or when you are drawing a comparison between the two marks.”<sup>9</sup>

59. I disagree with the above submissions. The contested mark incorporates all the letters from the earlier mark except for the letter ‘r’ (G-ounded/GROUNDED). Points of visual difference arise from the substitution of a seedling device in place of the conventional letter “r” of the earlier mark. There is no such counterpart in the contested mark. Taking all the factors into account, including the overall impression, I find that that the degree of visual similarity falls between medium and high.

### Aural comparison

60. At the hearing, Mr Abbas submitted that:

“Phonetically the marks are completely not identical. In terms of the way that they are said, we do not believe them to be phonetically comparable whatsoever. One of the reasons for that is one is a figurative mark, and one is a word mark, and it is questionable that there is a way that consumer would be able to differentiate between the two.”<sup>10</sup>

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<sup>9</sup> Page 13 of the transcript.

<sup>10</sup> Page 14 of the transcript.

61. I disagree with the submissions of Mr Abbas. Both of the competing marks will be pronounced as “GROUN-DED”. I find that the average consumer will naturally replace the seedling device in the earlier mark with the letter ‘r’, as the mark resembles the word “Grounded”, which is known to them. Therefore, I find that there is a high degree of aural similarity.

### Conceptual comparison

62. Mr Abbas claimed that there is no conceptual similarity without providing any further explanation.

63. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.<sup>11</sup>

64. The word “GROUNDED” is a commonly known word that the UK average consumer can easily understand. Although it has more than one meaning, it is my view that it will be interpreted as something that is placed/put on the ground. The average consumer will attribute the same meaning to the earlier mark based on its verbal element and the seedling device. In addition to the concept stemming from the word element, I consider that the device in the earlier mark will evoke the concept of a seedling which could be suggestive of the nature of the registered goods. Therefore, considering all the factors and the points of the overall impression, and despite the presence/absence of the seeding device, I consider there to be a high degree of similarity between the competing marks on a conceptual level.

### **Opposition Proceedings**

65. In this instance, Mr Abbas, again, submitted that the marks are not visually, phonetically, or conceptually similar or identical.

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<sup>11</sup> *Ruiz Picasso v OHIM* [2006] E.C.R.-I-643; [2006] E.T.M.R. 29.

### Overall Impression

66. I adopt the same finding as in paragraph 56 above in relation to the overall impression of the earlier mark.
67. The contested mark consists of the word “GROUNDED” which is presented in bold, upper case, and a standard typeface. I note that the letter ‘O’ is underlined, and the word element “GROUNDED” is followed by the registered trade mark symbol ‘®’. I do not consider that the average consumer will attribute any weight to the registered trade mark symbol, as they will be accustomed to seeing that symbol used with trade marks. As a result, the verbal element “GROUNDED” will have the greatest role in the overall impression, with the stylisation playing a minor one.

### Visual comparison

68. In this instance again, the contested mark contains 7 out of 8 letters of the earlier mark (G-OUNDED). However, there is a seedling device in the earlier mark with no counterpart in the contested mark. Based on the overall impression, I do not consider the difference created by the underlined letter ‘O’ and the registered trade mark symbol to be significant. Considering all the factors, including the overall impression of the marks, I find that the degree of visual similarity falls between medium and high.

### Aural comparison

69. There is a high degree of aural similarity between the competing marks for the same reasons as advanced in paragraph 61 of this decision. In addition, it is my view that the average consumer will not attempt to pronounce the registered trade mark symbol in the contested mark.

### Conceptual comparison

70. For the same reasons delineated above in paragraph 63-64, I find here that the competing marks will be conceptually similar to a high degree.

## DISTINCTIVE CHARACTER OF THE EARLIER TRADE MARK

71. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 22 and 23, the CJEU stated that:

“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).

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).”

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

73. Mr Abbas submitted that the earlier mark “[...] is less distinctive [...] because they are making reference to a degree their marks is to do with a

plant-based product because they have a leaf in that figurative mark. [...] If you look at most vegan brands, they do make some sort of reference to a plant or a leaf, and this is what the opponent has done in theirs.”<sup>12</sup>

74. Grounded Foods Co. has not shown use of its mark and thus cannot benefit from any enhanced distinctiveness. In this respect, I have only the inherent distinctiveness of the earlier mark to consider. As detailed above, the word element “Grounded”, which is the only component that the competing marks have in common, is a dictionary word with the meaning that I have identified earlier in this decision, which I do not consider that has any allusive qualities. However, I agree with the submissions of RAW IS MORE LTD that the seedling device replacing the letter ‘r’ in the earlier mark will be allusive in relation to the goods for which it is registered. I find that the degree of inherent distinctiveness of the earlier mark as a whole will be medium.

## LIKELIHOOD OF CONFUSION

75. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred above in this decision. Such a global assessment is not a mechanical exercise. I must also have regard to the interdependency principle, that a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa.<sup>13</sup> It is essential to keep in mind the distinctive character of the earlier trade mark since the more distinctive the trade mark, the greater the likelihood of confusion. I must also keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon imperfect recollection.<sup>14</sup>

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<sup>12</sup> Page 13 of the transcript

<sup>13</sup> See *Canon Kabushiki Kaisha*, paragraph 17.

<sup>14</sup> See *Lloyd Schuhfabrik Meyer*, paragraph 27.

76. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking.
77. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Iain Purvis Q.C. (as he then was), sitting 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)."

These examples are not exhaustive. Rather, they were intended to be illustrative of the general approach.<sup>15</sup>

78. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C. (as he then was) as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it."

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<sup>15</sup> See *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207.

79. Earlier in this decision I have concluded that:

- the goods at issue range from identical to dissimilar;
- the average consumer is a member of the general public. The level of attention paid will be no more than average. The selection process is predominantly visual without discounting aural considerations;
- the competing marks are visually similar to between a medium and high degree, aurally to a high degree, and conceptually highly similar;
- the earlier mark is inherently distinctive to a medium degree.

80. Mr Abbas submitted that, *prima facie*, there is no likelihood of confusion between the competing marks for either of the consolidated proceedings.

81. Taking into account the above factors and the interdependence principle, I am persuaded that there is a likelihood of direct confusion for identical and similar goods to any degree. Based on the principle of imperfect recollection, it is my view that when the average consumer tries to recall the earlier mark, the seedling device may well be forgotten, as it will be perceived (and recalled) as a replacement of the letter “R”, albeit highly stylised. Further, the similarities between the marks, coupled with the average degree of attention paid during the purchasing process, are such that they will lead the average consumer to mistakenly recall or misremember the competing marks as each other.

82. If I am wrong on direct confusion, I consider the marks would be indirectly confused. Having identified that the marks are different, the average consumer in the UK will assume that the respective marks originate from the same or economically linked undertakings. Despite the presence/absence of the seedling device in the competing marks, the common use of the verbal element GROUNDED with the same concept will lead the consumers to erroneously conclude that the same provider is responsible for the goods and that the contested marks could be a brand variation or a

sub-brand. Therefore, I find that the average consumer would assume a commercial association between the parties, believing that the respective goods come from the same or economically linked undertakings.

### Fall-back Specification

83. As delineated above, during the hearing, Mr Abbas expressed his intention to file a fall-back specification. Following the hearing, RAW IS MORE LTD provided a fall-back specification by letter dated 28 April 2023, annexed to the end of this decision. I have given the opportunity to Grounded Foods Co. to make comments or submit any views as to the fall-back specification, though it chose not to do so. I note that a fall-back specification is non-binding. Thus, this will be considered below to the extent that it is deemed necessary.
84. With its fall-back specification, RAW IS MORE LTD offered a narrower specification by removing the terms struck-out in red from Classes 29 and 30. The fall-back specification removed goods that I have found to be similar or identical earlier in this decision, namely “*Dairy product substitutes; Cheese products from dairy product substitutes; Cheese dips; Plant-based cheese dips; Cheese mix of dairy product substitutes; Cheese substitutes; Plant-based cheese products; Dairy cream substitute*”. Based on my previous findings, these terms would give rise to a likelihood of confusion. By virtue of the removal of these terms, there would be no conflict and basis for the opposition and invalidation proceedings. My decision remains the same, as these terms will not proceed to registration or stand as registered in any case, and, as a result, their removal does not alter the outcome.
85. Further, the fall-back position contains terms that I have found dissimilar, namely “*Coconut milk powder; Cakes; Bakery products and bakery goods; Bakery desserts; Prepared desserts; Biscuits; Grab & go bakery goods; Grab & go cake bars; Grab & go cake slices; Grab & go Cake bars; Individually packaged cake slices; Food dressings [sauces]; Sauces;*

*Cooking sauces; Prepared foods in the form of sauces; Ice cream substitute; Ice cream, ice cream made on milk substitutes; Frozen yogurt made on milk substitutes; Frozen yogurt by dairy substitute; Fermented foods based on plants; Almond butter; Cashew butter; Peanut butter; Pistachio butter*". Again, in this instance, I find that the fall-back specification does not assist RAW IS MORE LTD, since there would be no basis for a likelihood of confusion with the opposition and invalidation proceedings for dissimilar goods.

## **OUTCOME**

### Invalidation proceedings

86. Part of the application for invalidation **succeeds, and the registered trade mark is declared invalid, subject to an appeal against this decision, with effect from 12 May 2020 for the following registered goods:**

**Class 29:** Cheese mix of dairy product substitutes; Cheese products from dairy product substitutes; Cheese substitutes; Plant-based cheese dips; Plant-based cheese products; Cheese dips; Dairy product substitutes; Probiotic dairy-based snack bars; Probiotic milk substitute based snack bars; Probiotic yoghurt-based snack bars; Probiotic yogurt-based snack bars; Milk replacer preparations for making yogurt; Yogurt replacements; Yogurt replacements and drink yogurt replacements containing coconut extracts; Yogurt substitutes containing coconut milk as a base; Coconut milk based drinks; Almond milk, almond milk based drinks; Beverages and beverages based on milk replacements [predominantly milk replacements]; Coconut milk; Coconut milk based milk shakes; Coconut milk based milk shakes; Coconut-based and vegetable-based milk replacement products for weight loss purposes; Coconut-based beverages for use as a milk substitute; Coconut-based yogurt and drinking yogurt free from milk and lactose; Flavoured plant-based milk shakes; Flavoured plant-based protein enriched milk shakes; Flavoured protein enriched

milk shakes; Functional food beverages such as milk replacement; Hemp milk used as a milk substitute; Milk shakes; Milk substitute based beverages; Milk substitute-based drinks containing coffee; Mocha flavoured plant-based milk shakes; Peanut milk; Peanut milk based drinks; Plant-based milk alternatives milk shakes; Rice milk; Rice milk for use as a milk substitute; Soya milk; Soya milk; Soya milk; Plant-based nutritional drinks in the form of vitamin and mineral drinks [milk substitutes]; Protein enriched milk shakes; Milk substitutes; Milk substitutes based on coconut as a main ingredient; Milk substitutes containing oats; Oat based drinks with fruit flavour; Oat milk (milk substitute); Oat-based beverage for use as a milk substitute; Almond butter; Cashew butter; Peanut butter; Pistachio butter; Bean dips.

**Class 30:** Dairy cream substitute.

87. Part of the application for invalidation **fails, and the registration may stand as registered, subject to appeal, for the following goods:**

**Class 5:** Pharmaceutical preparations and substances; Dietary food preparations; Natural healthcare preparations and substances; Food supplements; Protein powder dietary supplements; Powdered plant-based protein dietary supplements; Plant-based protein dietary supplements in powder form; Fortified beverages; Health supplements.

**Class 29:** Bases for making milk shakes; Edible fats for making milk shakes; Insect larvae based preparations for making milk shakes; Insect-based preparations for making milk shakes; Milk products in paste form for making milk shakes; Milk products in powder form for making milk shakes; Mixtures for making milk shakes; Plant-based nutritional beverage mixer [milk substitutes]; Powders for making milk shakes; Preparations for making milk shakes; Coconut milk powder; Almond butter; Cashew butter; Peanut butter; Pistachio butter.

**Class 30:** Cakes; Bakery products and bakery goods; Bakery desserts; Prepared desserts; Grab & go bakery goods; Grab & go cake bars; Grab & go cake slices; Grab & go Cake bars; Individually packaged cake slices; High protein cake bars; High protein flavoured cake slices; High protein individual cake bites; High protein cakes; Protein-enriched cakes; Protein-enriched bakery products; Protein-enriched baked goods; Low-sugar cakes; Low-sugar cake bars; Low-sugar cake bites; Food dressings [sauces]; Sauces; Cooking sauces; Prepared foods in the form of sauces; Ice cream substitute; Ice cream, ice cream made on milk substitutes; Frozen yogurt made on milk substitutes; Frozen yogurt by dairy substitute.

Opposition proceedings

88. Part of the opposition under Section 5(2)(b) **succeeds and, subject to an appeal against this decision, the application will be refused for the same goods as in paragraph 86 of this decision.**
89. Part of the opposition **fails, and the application may, subject to appeal, proceed to registration for the same goods as in paragraph 87 of this decision.**

**COSTS**

90. In terms of costs, both parties have achieved a measure of success, and, thus, each party should bear its own costs.
91. The appeal period will run from the date of this decision.

**Dated this 5<sup>th</sup> day of July 2023**

**Dr Stylianos Alexandridis  
For the Registrar,  
The Comptroller General**

## ANNEX

### Fall-back Specification

#### Classification 29 – (proposed changes to be made in red)

*Dairy product substitutes*; Milk substitutes; Milk substitutes containing oats; Milk substitutes based on coconut as a main ingredient; Coconut milk based milk shakes; Oat milk (milk substitute); Milk substitute based beverages; Oat-based beverage for use as a milk substitute; Coconut-based beverages for use as a milk substitute; Beverages and beverages milk shakes based on milk replacements [predominantly milk replacements]; Almond milk, almond milk based drinks; Coconut milk; Coconut milk based drinks; ~~Cheese dips; Plant-based cheese dips~~; Bean dips; Coconut milk based milk shakes; Plant-based milk alternatives milk shakes; Hemp milk used as a milk substitute; Peanut milk; Peanut milk based drinks; Rice milk; Rice milk for use as a milk substitute; Soya milk; Soya milk; Soya milk; Functional food beverages such as milk replacement; Oat based drinks with fruit flavour; Milk substitute-based drinks containing coffee; Yogurt replacements; Yogurt substitutes containing coconut milk as a base; Milk replacer preparations for making yogurt; Coconut-based yogurt and drinking yogurt free from milk and lactose; Yogurt replacements and drink yogurt replacements containing coconut extracts; ~~Cheese products from dairy product substitutes; Cheese mix of dairy product substitutes; Cheese substitutes; Plant-based cheese products; Coconut milk powder; Peanut butter; Cashew butter; Almond butter; Pistachio butter~~; Milk shakes; Bases for making milk shakes; Mixtures for making milk shakes; Preparations for making milk shakes; Flavoured protein enriched milk shakes; Flavoured plant-based protein enriched milk shakes; Mocha flavoured plant-based form for making milk shakes; Milk products in powder form for making milk shakes; Compotes, Spreads of fruit and vegetables; Prepared fruit, fruit snacks, fruit chips; Fruit based snack products; Fruit juices for cooking; Vegetable juices for cooking; Extracts of vegetables [juices] for cooking; Coconut-based and vegetable-based milk replacement products for weight loss purposes; Plant-based nutritional beverage mixer [milk substitutes]; Plant-based nutritional drinks in the form of vitamin and mineral drinks [milk substitutes]; Probiotic almond-based snack bars; Probiotic dairy-based snack bars; Probiotic milk substitute based snack bars; Plant-based probiotic snack bars; Probiotic nut-based snack bars; Probiotic soy-based snack bars; Probiotic seed-based snack bars; Probiotic yoghurt-based snack bars; Probiotic yogurt-based snack bars; Probiotic dried fruit-based snack bars; Flavoured plant-based milk shakes; Protein enriched milk shakes; Powders for making milk shakes; Edible fats for making milk shakes; Insect-based preparations for making milk shakes; Insect larvae based preparations for making milk shakes; Milk products in paste.

### **Classification 30 – (proposed changes to be made in red)**

Food products and foods made from cereals; Crisps made of cereals; Breakfast cereals containing fibre; Muesli mainly consisting of cereals; Cereal bars and energy bars; Bread; Bread and bread mixes made from whole grains; ~~Cakes~~; Pastry and pastry products; ~~Bakery products and bakery goods~~; Confectionery products; ~~Bakery desserts~~; ~~Prepared desserts~~; ~~Biscuits~~; ~~Grab & go bakery goods~~; ~~Grab & go cake bars~~; ~~Grab & go cake slices~~; ~~Grab & go Cake bars~~; ~~Individually packaged cake slices~~; Cake doughs; Chocolate for confectionery; Cookie dough; Mixes for bakery goods; High protein cake bars; High protein flavoured cake slices; High protein individual cake bites; High protein cakes; Protein-enriched cakes; Protein-enriched bakery products; Protein-enriched baked goods; Protein-enriched cookies; Low-sugar cakes; Low-sugar cake bars; Low-sugar cake bites; Protein- enriched cereal bars; Pancakes; Waffles; Batter for making pancakes; ~~Food dressings [sauces]~~; ~~Sauces~~; ~~Cooking sauces~~; ~~Prepared foods in the form of sauces~~; ~~Ice cream substitute~~; ~~Ice cream, ice cream made on milk substitutes~~; ~~Dairy cream substitute~~; ~~Frozen yogurt made on milk substitutes~~; ~~Frozen yogurt by dairy substitute~~; ~~Fermented foods based on plants~~; Chocolate-based bars; Chocolate-based ready-to-eat food bars; Chocolate based products; Chocolate flavourings; Chocolate; Chocolates; Vegan chocolate; Allergen-free chocolate; Chocolate spreads; Chocolate flavoured confectionary; Chocolate toppings; Prepared desserts [chocolate based]; Confectionary items coated with chocolate; Chocolate coated nuts; Chocolate with alcohol; Alternative milk based chocolate; Preparations based on cocoa; Plant-based chocolate; Plant-based confectionary; Plant- based chocolate desserts; Madagascan plant-based milk chocolate; Ecuadorian chocolate; Ecuadorian plant-based chocolate; Plant-based salted caramel chocolate; Plant-based peanut chocolate; Chocolate containing nuts; Chocolate containing roasted nuts; Coconut-based chocolate; Vegan chocolate containing dried fruits and nuts; Plant-based chocolate truffles; Protein-enriched chocolate; Protein-enriched chocolate bars; Chocolate containing fruits and nuts.