

O-083-14

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No. 2617697  
BY AMJAD ALI MALIK  
TO REGISTER THE TRADE MARK  
NIRALA HALWAI  
IN CLASS 30  
AND**

**IN THE MATTER OF JOINT OPPOSITION  
THERE TO UNDER No. 1035841 BY  
RANA IFTIKAR AHMAD; RANA IFTIKHAR AHMAD t/a NIRALA SWEETS (LONDON)  
and NIRALA SWEETS LONDON.**

## BACKGROUND

1) On 16 April 2012, Mr Amjad Ali Malik (hereinafter the applicant) applied to register the trade mark NIRALA HALWAI in respect of the “confectionery” in Class 30.

2) The application was examined and accepted, and subsequently published for opposition purposes on 22 June 2012 in Trade Marks Journal No.6945.

3) On 24 September 2012 Rana Iftikar Ahmad; Rana Iftikhar Ahmad t/a Nirala Sweets (London) and Nirala Sweets London (hereinafter the opponents) jointly filed a notice of opposition. The grounds of opposition are in summary:

a) The mark in suit comprises the words “Nirala” which is an Urdu word meaning “unique” and “Halwai” which is an Urdu word meaning “sweet maker” which is commonly used to refer to a person/shop which sells sweets. The relevant trade and purchasing public will speak or be familiar with Urdu and therefore the mark in suit offends against Section 3(1)(c).

b) The opponents state:

“We refer to opposition number 103613 in which the opponent’s related company Gourmet Bakers and Sweets London Limited is the opponent, and to the latter’s claims in that opposition that the applicant i.e. Gourmet of London Ltd has, over the past (at the time of filing opposition number 103613) six months, been causing disruption to and copying the opponent’s business by e.g. head-hunting, recruiting and attempting to recruit members of the opponent’s staff; opening up of copycat businesses; copying the opponent’s products and/or product line(s); registering and operating under a similar company name in relation to the same and similar goods and services; and filing applications to register, for use upon the same and similar goods and services, trade marks that are closely and confusingly similar to the opponent’s company name, registered trade mark and other previously applied for trade mark. It is submitted that application no.2617697 that is the subject of this opposition is in keeping with the pattern of this campaign (which, it is submitted, extends to the opponent’s Nirala Sweets business also) and the latter-mentioned activities.” It is claimed that the mark in suit offends against Section 3(6) of the Act.

c) The following marks are owned by Mohammad Sajjad Hussain & Rana Iftikhar Ahmad t/a Nirala Sweets (London) (1548582); and Rana Iftikar Ahmad (CTM 6492805 and 2580245).

Mark	Number	Date filed/ registered	Class	Specification relied upon
NIRALA  LIMITATION: The mark consists of the Urdu word	1548582	23.09.93 08.09.00	30	Sugar; preparations made from cereals; pastries and confectionery; sweets,

meaning "Unique".				candies and chocolates; ices and ice creams; honey and treacle; all included in Class 30.
	CTM 6492805	06.12. 07 12.11.08	29	Jellies, jams and compotes; preserves; yoghurt, drinking yoghurt; foodstuffs comprising or made from any of the aforesaid goods.
			30	Sugar, tapioca, sago, flour and preparations made from cereals; bread, pastry and confectionery; ices; honey, treacle, halvah, ice cream, pastries, confectionery, puddings, desserts, sherberts, sorbets, tarts, foodstuffs comprising or made from any of the aforesaid goods.
NIRALA Sweets & Bakers	2580245	05.05.11 18.11.11	29	Jellies, jams.
			30	Preparations made from cereals, bread, pastry and confectionery.

d) The opponents contend that the word "HALWAI" contained in the mark in suit should be disregarded as it is purely descriptive matter being the Urdu word for "sweet maker" commonly used to refer to a person/shop that sells sweets including in the UK. They claim that the mark in suit offends against Sections 5(1) or in the alternative 5(2)(b) as the marks and goods are identical/similar. They also claim that there is a family of NIRALA marks.

e) The opponents claim to have been using the marks "NIRALA" / "NIRALA SWEETS" / "NIRALA SWEETS AND BAKERS" in the UK since the early 1980s /90s and 2010 respectively and state they have acquired a reputation and goodwill in the name in relation to confectionery. Use of the mark in suit will lead the public to believe that the companies are connected or that the goods offered by the applicant are those of the opponent and therefore damage will be caused to the opponents' businesses. The mark in suit therefore offends against Section 5(4)(a) of the Act.

4) On 20 December 2012, the applicant filed a counterstatement denying the ground. He put the opponents to strict proof of use of mark number 1548582 in respect of the goods relied upon. He points out that trade mark number 1548582 is jointly owned and under Section 23(5) of the Trade Marks Act 1994 the co-proprietor must be added as a joint plaintiff or as a defendant. He accepts that the words "NIRALA" and "HALWAI"

mean “unique/rare” and “sweet maker” in Urdu. However, he also contends that the word “NIRALA” is used as a “christian name” by which I assume he means forename. Further, he contends even Urdu speakers would view the mark as a name of a particular person who is a sweetmaker. He states that those non-Urdu speakers would simply view the mark as a whole and would not immediately and without further reflection make a definite and direct association between the goods and the meaning of the words in the mark (*Celltech* case C-273/05P). He states that the combination of the two words in the mark in suit is unusual and that names are distinctive enough to be registered. All the other grounds are similarly denied.

5) Both sides filed evidence. Both parties seek an award of costs in their favour. Neither side wished to be heard. Both sides filed written submissions which I shall refer to as and when relevant in my decision.

### **OPPONENTS’ EVIDENCE**

6) The opponents filed a witness statement, dated 7 March 2013, by Mr Rana Iftikar Ahmad. He states that he is the sole proprietor of Nirala Sweets having bought out his original partner, Mohammad Sajjad Hussain in July 1997. He states that he has used the mark “NIRALA” on a variety of sweets, candies, chocolates, ices, honey, pastries and preparations from cereals. He provides a list of the Urdu names of these products but this is not relevant. He also confirms that since 1997 he has been using the mark NIRALA ORIGINAL in both word and device form on signboards and the mark NIRALA SWEETS AND BAKERS on SHOP canopies since May 2011. He confirms that he has six shops in London and sells via the internet throughout the UK and also parts of Europe. Mr Ahmad provides evidence which shows that Urdu is widely spoken and understood in the UK.

7) Mr Ahmad provides copies from his internet site and also pictures of boxes of products, but none are dated and so do not assist me in my decision. Other enclosures which are dated such as the TV and magazine advertisements contain no details of the channel the advertisement was shown on, the number and timings of screenings, viewer figures, circulation of the magazine, whether it was sold or given away, the number produced, the length of time it was available etc. The only mark visible in relation to the TV advertising is the CTM 6492805 mark. The London EID 2010 magazine has an advertisement which is very similar to CTM 6492805 except that the word “original” has been replaced by the word “sweets” There would appear to be an invoice from ARY which is promoted as “The Best British Pakistani Channel” at exhibit RIA5 but it cannot be read. He states that the marks are advertised on television on various channels but there is no corroborative evidence. Exhibit RIA7 has an article which would appear to be from the internet, dated 25 October 2012. This mentions confectionery under the mark “NIRALA” as being recommended. No details, other than its name, are provided of the website which hosted this article. He also provides copies of witness statements and exhibits which relate to an opposition case in respect of the mark GOURMET. I have read it thoroughly but could not find references to the marks

involved in the instant case. I do not believe that any of this evidence is relevant to the instant case, even if the parties may be the same.

## **APPLICANT'S EVIDENCE**

8) The applicant Mr Amjad Ali Malik filed a witness statement, dated 28 June 2013. He states that he is not a Director or a shareholder in the company Gourmet of London Ltd which featured in the opponents' evidence. He provides a Google search which shows 34 hits for businesses listed under the term NIRALA. However, 5 relate to a restaurant in Manningtree, 18 relate to a restaurant in Tewkesbury and 7 relate to a restaurant in Cambridge. He also provides a news release by the Office for National Statistics which shows there were just over 8 million people in London in 2011. Mr Malik states that even if there were 100,000 Urdu speakers this equates to only 1.2% of the population of London.

## **OPPONENTS' EVIDENCE IN REPLY**

9) The opponents filed another witness statement by Mr Ahmad, dated 16 September 2013. In response to criticism of his earlier exhibits he provides a photograph of his first shop which is clearly named NIRALA at exhibit RIA1a. At RIA2a he provides an image from the website of an Indian newspaper dated 11 August 2007 which also shows the shop front. At exhibit RIA3 he provides an email from his web designer confirming that the internet site was initiated on 13 February 2012. Mr Ahmad states that the TV commercials referred to in his previous statement were aired during the period 12 September 2011- 18 March 2012. Three of the adverts were of ten seconds duration the other lasted fifteen seconds. The four advertisements were shown a total of 217 times. With regard to the Eid magazine mentioned in his previous statement, he now provides documentation which shows that 30,000 copies were placed in schools, libraries and strategic pick up points. Mr Ahmad provides yet more information relating to companies that the applicant is said to be connected with, and more evidence in relation to "Gourmet" marks and the so called campaign against the opponent. He also provides the following exhibits:

- RIA6a he provides an email response from the writer of the article previously exhibited at RIA7 confirming that the business in question was that of the opponent. This also shows that the blog that the article was posted on has 1200 followers.
- RIA7a: This shows two pages from the website Oxford Advanced Learners Dictionary which has an entry for HALWA. Mr Ahmed contends that the word is therefore common in the English language and would be known as meaning an Asian sweet food. I take issue with this contention as the website referred to is not an English language dictionary, and the word which is more commonly used in English for this type of product is halva or halvah.

10) That concludes my summary of the evidence filed, insofar as I consider it necessary.

## DECISION

11) The applicant has raised the issue of the legitimacy of basing an opposition on a jointly owned mark when only one of the owners is named as an opponent in its written submissions. However, the opponent relies upon Section 23(5) of the Act which relates to infringement proceedings only.

12) I shall first consider the ground of opposition under Section 3(6) which reads:

“3.(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

13) Section 3(6) has its origins in Article 3(2)(d) of the Directive, the Act which implements Council Directive No. 89/104/EEC of 21 December 1988 which states:

“Any Member State may provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that....

(c) the application for registration of the trade mark was made in bad faith by the applicant.”

14) I refer to case O/094/11 *Ian Adam* where Mr Hobbs QC acting as the Appointed Person said:

“32. Any attempt to establish bad faith must allow for the fact that there is nothing intrinsically wrong in a person exercising *‘the right to apply the rules of substantive and procedural law in the way that is most to his advantage without laying himself open to an accusation of abuse of rights’* as noted in paragraph [121] of the Opinion delivered by Advocate General Trstenjak in Case C-482/09 Budejovicky Budvar NP v. Anheuser-Busch Inc on 3 February 2011. In paragraph [189] of his judgment at first instance in Hotel Cipriani SRL v. Cipriani (Grosvenor Street) Ltd [2009] EWHC 3032 (Ch); [2009] RPC 9 Arnold J. likewise emphasised:

“... that it does not constitute bad faith for a party to apply to register a Community trade mark merely because he knows that third parties are using the same mark in relation to identical goods or services, let alone where the third parties are using similar marks and/or are using them in relation to similar goods or services. The applicant may believe that he has a superior right to registration and use of the mark. For example, it is not uncommon for prospective claimants who intend to sue a prospective defendant for passing off first to file an application for registration to strengthen their position. Even if the applicant does not believe that he has a superior right to registration and use of the mark, he may still believe that he is entitled to registration.

The applicant may not intend to seek to enforce the trade mark against the third parties and/or may know or believe that the third parties would have a defence to a claim for infringement on one of the bases discussed above. In particular, the applicant may wish to secure exclusivity in the bulk of the Community while knowing that third parties have local rights in certain areas. An applicant who proceeds on the basis explicitly provided for in Art. 107 can hardly be said to be abusing the Community trade mark system.”

These observations were not called into question in the judgment of the Court of Appeal in that case: [2010] EWCA Civ 110; [2010] RPC 16. They were re-affirmed by Arnold J. in *Och-Ziff Management Europe Ltd v. Och Capital LLP* [2011] ETMR 1 at paragraph [37].

33. The line which separates legitimate self-interest from bad faith can only be crossed if the applicant has sought to acquire rights of control over the use of the sign graphically represented in his application for registration in an improper manner or for an improper purpose. The appropriate remedy will in that case be rejection of the offending application for registration to the extent necessary to render it ineffective for the purpose which made it objectionable in the first place.

34. In a case where the relevant application fulfils the requirements for obtaining a filing date, the key questions are: (1) what, in concrete terms, is the objective that the applicant has been accused of pursuing? (2) is that an objective for the purposes of which the application could not properly be filed? (3) is it established that the application was filed in pursuit of that objective? The first question serves to ensure procedural fairness and clarity of analysis. The second question requires the decision taker to apply a moral standard which, in the absence of any direct ruling on the point from the Court of Justice, is taken to condemn not only dishonesty but also ‘*some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined*’: Gromax Plasticulture Ltd v. Don & Low Nonwovens Ltd [1999] RPC 367 at 379 (Lindsay J). The third question requires the decision taker to give effect to the principle that innocence must be presumed in the absence of evidence sufficient to show that the applicant has acted improperly as alleged.

35. In assessing the evidence, the decision taker is entitled to draw inferences from proven facts provided that he or she does so rationally and without allowing the assessment to degenerate into an exercise in speculation. The Court of Justice has confirmed that there must be an overall assessment which takes into account all factors relevant to the particular case: Case C-529/07 Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH [2009] ECR I-4893 at paragraph [37]; Case C-569/08 Internetportal und Marketing GmbH v. Richard Schlicht [2010] ECR I-00000 at paragraph [42]. As part of that assessment it is necessary as part of that approach to consider the intention of the applicant at the time when the application was filed, with intention being regarded as a subjective factor to be

determined by reference to the objective circumstances of the particular case: Chocoladefabriken Lindt & Sprüngli GmbH (above) at paragraphs [41], [42]; Internetportal and Marketing GmbH (above) at paragraph [45]. This accords with the well-established principle that ‘national courts may, case by case, take account -on the basis of objective evidence -of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely’: Case C16/05 The Queen (on the applications of Veli Tum and Mehmet Dari) v. Secretary of State for the Home Department [2007] ECR I-7415 at paragraph [64].

36. The concept of assessing subjective intention objectively has recently been examined by the Court of Appeal in the context of civil proceedings where the defendant was alleged to have acted dishonestly: Starglade Properties Ltd v. Roland Nash [2010] EWCA Civ 1314 (19 November 2010). The Court considered the law as stated in Royal Brunei Airlines v. Tan [1995] 2 AC 378 (PC), Twinsectra Ltd v Yardley [2002] 2 AC 164 (HL), Barlow Clowes International Ltd v. Eurotrust International Ltd [2006] 1 WLR 1476 (PC) and Abu Rahman v. Abacha [2007] 1 LL Rep 115 (CA). These cases were taken to have decided that there is a single standard of honesty, objectively determined by the court and applied to the specific conduct of a specific individual possessing the knowledge and qualities that he or she actually possessed: see paragraphs [25], [28], [29] and [32]. This appears to me to accord with treating intention as a subjective factor to be determined by reference to the objective circumstances of the particular case, as envisaged by the judgments of the Court of Justice relating to the assessment of objections to registration on the ground of bad faith.”

15) In asserting that the mark was applied for in bad faith, the onus rests with the opponents to make a prima facie case. A claim that a mark was applied for in bad faith implies some action by the applicant which a reasonable person would consider to unacceptable behaviour or, as put by Lindsay in the *Gromax* trade mark case [1999] RPC 10:

“includes some dealings which fall short of the standards of acceptable commercial behaviour”.

16) The issue must be determined on the balance of probabilities. On the basis of these authorities it is clear that a finding of bad faith may be made in circumstances which do not involve actual dishonesty. Furthermore, it is not necessary for me to reach a view on the applicant’s state of mind regarding the application for registration if I am satisfied that his actions in applying for the mark in the light of all the surrounding circumstances would have been considered contrary to normally accepted standards of honest conduct.

17) In the instant case it is by no means clear quite what the basis of the bad faith claim is, although various claims are made regarding the other mark. It is not clear that the applicant was aware of the activities of the opponents and even if he were, the filing of

an application for a mark even if it is identical to that of the opponents' marks is not clear evidence of bad faith. Mr Ahmad has provided a great deal of evidence relating to a series of disputes over "Gourmet" marks. Whilst there may be a series of clashes between businesses, attempting to register similar trade marks, head hunting staff etc is not evidence of an application submitted in bad faith. However, there is a complete lack of evidence that the applicant was in any way involved in these disputes, or how they relate to this case. I note also that he denies being an officer of any of the companies involved. I find that the mark was not applied for in bad faith, and so the opposition based upon Section 3(6) fails.

18) I now turn to consider the ground of opposition based on section 5(2)(b) which reads:

5.-(2) A trade mark shall not be registered if because -

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

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

19) An "earlier trade mark" is defined in section 6, the relevant part of which states:

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

- (a) a registered trade mark, international trade mark (UK) or Community trade mark 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."

20) The opponents are relying upon their marks listed in paragraph 3 above which are clearly earlier trade marks. It is clear that the opponents' mark 1548582 is subject to the proof of use rules. It is equally clear that the opponent has not provided anywhere near sufficient evidence to satisfy the proof of use requirements. This leaves just CTM 6492805 and UK 2580245. Given the interplay between the dates the opponents' marks were registered and the publication date of the mark in suit, the proof of use provisions do not come into play.

21) When considering the issues under Section 5(2) and the likelihood of confusion, I take into account the guidance from the settled case law provided by the CJEU in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000]

F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). In the recent case of *La Chemise Lacoste SA v Baker Street Clothing Ltd* [ALLIGATOR O/333/10] Mr Hobbs QC acting as the Appointed Person set out the test shown below which was endorsed by Arnold J. in *Och-Ziff Management Europe Ltd and Oz Management Lp v Och Capital LLP; Union Investment Management Ltd & Ochocki*, [2010] EWCH 2599 (Ch).

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

(e) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 in that mark;

(f) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa;

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

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

(i) 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;

(j) if the association between the marks causes the public to wrongly believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

### **Distinctive character of the opponents' earlier trade marks**

22) The opponents have provided what is said to be evidence of use of its marks in the UK. However, in my opinion, the evidence provided was long on rhetoric and very short on facts. There were no turnover figures, no indication of market share, few if any of the exhibits were dated and where they were they usually did not show use of the registered marks. The opponents cannot benefit from an enhanced reputation. However, I am willing to accept that the opponents' marks are of average distinctive character for the goods for which they are registered.

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

23) This is a clear area of disagreement between the parties. The opponents contend that the average consumer should be regarded as an Urdu speaker, whilst the applicant contends that the general UK public should be regarded as the average consumer. The goods of the two parties can be said, broadly speaking, to be foodstuffs. I see no reason why these would be restricted to a particular ethnic group and agree with the applicant that the average consumer is the UK general public. Both parties' specifications will be sold in, inter alia, traditional retail outlets on the high street, through catalogues and on the Internet. The average consumer is likely, in my opinion, to select the goods mainly by visual means. I accept that certain more obscure or expensive items may be researched or discussed with a member of staff, but the goods are foodstuffs and everyday items.

24) Clearly, the average consumer's level of attention will vary considerably depending on the cost and nature of the item at issue. However, to my mind even when selecting routine inexpensive items of food or even the proverbial bag of sweets, the average consumer will pay attention to considerations such as ingredients due to the increasing number of allergies and concerns over calories etc. Overall the average consumer is likely to pay a reasonable degree of attention to the selection of items of food.

### **Comparison of goods**

25) Both of the opponents' trade marks CTM 6492805 and UK2580245 cover "confectionery" in class 30 which are identical to the goods applied for.

### **Comparison of trade marks**

26) The trade marks to be compared are as follows:

Applicant's mark	Opponents' marks
NIRALA HALWAI	<u>CTM 6492805</u>
	
	<u>UK 2580245</u>
	NIRALA Sweets & Bakers

27) It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

### **Distinctive and dominant components**

28) It is accepted by both parties that both words NIRALA and HALWAI are Urdu words meaning “unique /rare” and “sweet maker /sweet seller” respectively. The applicant contended that the word NIRALA is also used as a forename, but there is no corroborative evidence provided to support this. I accept that it is possible that some might believe that the words are a person’s name. With regard to the applicant’s mark I do not believe that either element dominates the other although I accept that the first part of a trade mark is usually seen as more important. With regard to the opponents’ mark CTM 6492805 clearly the dominant element is the word NIRALA. The device element appears to be an ear of corn and is, to my mind, not the dominant element as such devices are commonly used to denote that the product is made of pure natural ingredients. It will not be ignored but will not register highly upon the average consumer. Similarly, the word “Original” which appears in a much smaller font underneath the word “NIRALA” is also used to convey wholesomeness, and again, as such will be ignored for the most part as it is descriptive. In respect of the opponents’ mark UK 2580245 the dominant element is the word NIRALA. The words “Sweets and Bakers” when used in respect of the goods relied upon will be seen as merely descriptive of what the company produces. This does not mean that they can be overlooked but merely that they would barely register with the average consumer.

## Visual / Aural and Conceptual similarity

29) Clearly both marks contain the term NIRALA. They differ in that the applicant's mark also has the term HALWAI as its second element, whereas the opponent's marks both contain additional material, all of which would be seen as descriptive or non distinctive. The fonts also differ but neither font is particularly outlandish or memorable and in both cases the words are clearly visible and easy to read. Clearly, there is a significant visual and aural similarity between the marks albeit there are differences. For the average consumer the marks have no meaning. For Urdu speakers the marks have a meaning as a simple descriptor of the maker or seller being unique or rare. Overall, the respective marks share a high level of similarity.

## Likelihood of confusion

30) I must now take all the above into account and consider the matter globally taking into account the interdependency principle- a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods and vice versa. The evidence does not allow me to find the opponents to have a reputation in respect of confectionery, however given the similarity of the marks, and the fact that the goods are identical, and allowing for the concept of imperfect recollection, there is a likelihood of consumers being confused into believing that the goods provided by the applicant are those of the opponents or provided by some undertaking linked to them. **The opposition under Section 5(2) (b) therefore succeeds.**

31) Given this finding I do not need to go on to consider the other grounds of opposition.

## COSTS

32) As the opponents have enjoyed a measure of success they are entitled to a contribution towards their costs. I have reflected the fact that the opponents' evidence was clearly driven by the maxim "never mind the quality feel the width" as it did not establish what it set out to do and did not assist me in my decision, and simply caused the applicant to have to deal with the inadequacies of it.

Expenses	£200
Preparing a statement and considering the other side's statement	£100
Preparing evidence and considering the evidence of the other side	£100
<b>TOTAL</b>	<b>£400</b>

33) I order Amjad Ali Malik to pay Rana Iftikar Ahmad; Rana Iftikar Ahmad t/a Nirala Sweets (London) and Nirala Sweets London collectively the sum of £400. This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated 25<sup>th</sup> February 2014**

**George W Salthouse  
For the Registrar,  
the Comptroller-General**