

O/1012/23

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION UK0000325548

IN THE NAME OF ELBISCO INDUSTRIAL AND COMMERCIAL FOODS S.A.

AND

APPLICATION 504749

**BY KERANGUS HOLDINGS LTD FOR A DECLARATION THAT REGISTRATION
UK0000325548 IS INVALID**

AND

APPLICATION UK00003651180

BY KERANGUS HOLDINGS LTD

AND

OPPOSITION 428814

BY ELBISCO INDUSTRIAL AND COMMERCIAL FOODS S.A.

Background and Pleadings

1. On 4 June 2021, Kerangus Holdings LTD ('Kerangus') applied to register the following trade mark UK00003651180:



For the following goods:

Class 29:

Meat, fish, poultry and game; Meat extracts; Preserved, frozen, dried and cooked fruits and vegetables; Ready cooked meals made from meat, poultry, game, vegetables; Frozen meals consisting primarily of meat, poultry, game, vegetables; Jellies, jams, compotes; Eggs; Olive oil, extra virgin olive oil, sunflower oil, maize oil.

Class 30:

Coffee, tea, cocoa and artificial coffee; Rice, pasta and noodles; Tapioca and sago; Flour and preparations made from cereals; Bread, pastries and confectionery; Bread rolls, filled bread rolls; potstickers, dumplings; [sic] Rusks; Crispbread snacks; Wholewheat crisps; Breadsticks; Croutons; Biscuits; Savory biscuits; Pasta based prepared meals, rice based prepared meals; Chocolate; Ice cream, sorbets and other edible ices; Sugar, honey, treacle; Yeast, baking-powder; Salt, seasonings, spices, preserved herbs; Vinegar, sauces and other condiments; Ice [frozen water].

2. On 3 December 2021, the application for UK00003651180 was opposed by Elbisco Industrial and Commercial Foods S.A. ('Elbisco') under section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). In the opposition, Elbisco relies on the following earlier registration:

UK00003255468



Filing date: 8 September 2017

Date of entry in register: 2 February 2018

Relying on the following goods:

Class 30:

Bread; Hushpuppies [breads]; Unleavened bread; Unleavened bread in thin sheets; Bread flavoured with spices; Bread with sweet red bean; Unfermented bread; Matzo; Pitta bread; Bread casings filled with fruit; Tortilla shells; Malted bread mix; Danish bread; Danish bread rolls; Empanadas; Oat cakes for human consumption; Tea cakes; Barm cakes; Bagels; Thin breadsticks; Soft rolls [bread]; English muffins; Crispbread snacks; Semi-baked bread; Baguettes; Oat biscuits for human consumption; Bread biscuits; Biscuits [sweet or savoury]; Aperitif biscuits; Onion or cheese biscuits; Jam filled brioches; Nan bread; Taco shells; Multigrain bread; Pre-baked bread; Garlic bread; Scones; Currant bread; Pykelets; Crumpets; Croutons; Tortillas; Toasted bread; Breadcrumbs; Crisp breads; Sandwich wraps [bread]; Fresh bread; Fruited malt loaf; Rusks; Dutch rusk; Toasts [biscuits]; Thick breadsticks; Crumb; Bread rolls; Cornflour bread rolls (almojábana); Steamed bread; Buns; Bacon buns; Malt bread; Bread and buns; Filled bread rolls; Bread with soy bean; Fruit breads; Low-salt bread; Wholemeal bread; Pumpernickel; Flat bread; Soda bread; Gluten-free bread; Pastries, cakes, tarts and biscuits (cookies); Hardtack [biscuits]; Salted tarts; Chocolate covered pretzels; Savory pastries; Macaroons [pastry]; Danish butter cookies; Milk chocolate teacakes; Fried dough cookies; Wafers; Wafers [food]; Flan base wafers; Bean-jam filled wafers (monaka); Chocolate caramel wafers;

Rolled wafers [biscuits]; Chocolate wafers; Almond pastries; Viennese pastries; Fruit filled pastry products; Orange based pastry; Pastries containing creams and fruit; Pastries containing fruit; Sweet biscuits for human consumption; Dutch gingerbread (taai taai); Chocolate pastries; Danish pastries; Prepared desserts [pastries]; Tarts [sweet or savoury]; Meringues; Strawberry gateaux; Flour confectionery; Edible wafers; Pastry shells for monaka; Pastry dough; Shortcrust pastry; Puff pastry; Pâtés en croûte; Vol-au-vent cases; Almond cake; Frozen yogurt cakes; Steamed sponge cakes (fagao); Malt cakes; Frozen pastries; Frozen pastry sheets; Frozen pastry stuffed with meat and vegetables; Frozen pastry stuffed with vegetables; Breakfast cake; Treacle tarts; Plum-cakes; Quiches; Pumpkin pies; Shortbread part coated with chocolate; Shortbread part coated with a chocolate flavoured coating; Shortbread with a chocolate flavoured coating; Crème brûlées; Crepes; Meat pies; Meat pies [prepared]; Brittle; Pie shells; Doughnuts; Cookie mixes; Long-life pastry; Madeleines; Apple tarts; Muffins; Cupcakes; Fruit cake snacks; Biscuits for human consumption made from malt; Biscuits for human consumption made from cereals; Petit-beurre biscuits; Shortbread with a chocolate coating; Biscuits flavoured with fruit; Biscuits having a chocolate flavoured coating; Biscuits with an iced topping; Biscuits having a chocolate coating; Half covered chocolate biscuits; Biscuits containing fruit; Fortune cookies; Biscuits containing chocolate flavoured ingredients; Sponge fingers [cakes]; Chocolate biscuits; Gingerbread nuts; Chocolate covered wafer biscuits; Brownies; Brioches; Fresh pasties; Fresh sausage rolls; Fresh pies; Biscuits for cheese; Pies; Pies [sweet or savoury]; Vegetable pies; Egg pies; Pastries containing creams; Cream pies; Non-meat pies; Pies containing meat; Pies containing vegetables; Fruit cakes; Egg roll cookies; Petits fours [cakes]; Savarins; Samosas; Pot pies; Flaky pastry containing ham; Vol-au-vents; Tarts; Egg tarts; Covered tarts; Custard tarts; Fried dough cookies (karintoh); Deep chocolate cake made with chocolate sponge; Chocolate cakes; Cream buns; Pastry shells; Gingerbread; Cereal bars and energy bars; Cereal cakes for human consumption; Snack foods made from corn and in the form of rings; Snack foods made of whole wheat; Cereal-based snack food; Rice-based snack food; Snacks manufactured from muesli; Granola-based snack bars; Snack bars containing a mixture of grains, nuts and dried fruit [confectionery]; Snack foods consisting principally of extruded cereals; Cereal

based energy bars; Cereal preparations consisting of bran; Cereal preparations consisting of oatbran; Cereal preparations coated with sugar and honey; Cereal products in bar form; Cereal bars; High-protein cereal bars; Muesli bars; Cereal based food bars; Bars based on wheat; Sopapillas [fried pastries]; Salted wafer biscuits; Salt crackers; Salted biscuits; Savory biscuits; Boiled confectionery; Panned sweets (Non-medicated -); Crumble; Sweetmeats; Prepared desserts [confectionery]; Bakery goods; Potato flour confectionery; Orange based confectionery; Confectionery having wine fillings; Dairy confectionery; Chocolate flavoured confectionery; Confectionery items coated with chocolate; Confectionery containing jelly; Nut confectionery; Confectionery having liquid spirit fillings; Confectionery having liquid fruit fillings; Confectionery containing jam; Chocolate confectionery having a praline flavour; Chocolate confectionery containing pralines; Chocolate-based spreads; Chocolate spreads containing nuts; Muesli desserts; Prepared desserts [chocolate based]; Sweetmeats [candy]; Flavoured sugar confectionery; Biscotti dough; Canapes; Waffles; Crackers; Crackers flavoured with fruit; Croissants; Turkish delight coated in chocolate; Chocolate coated nougat bars; Nougat; Non-medicated flour confectionery; Non-medicated flour confectionery containing imitation chocolate; Non-medicated flour confectionery coated with imitation chocolate; Non-medicated flour confectionery coated with chocolate; Non-medicated flour confectionery containing chocolate; Non-medicated confectionery containing milk; Non-medicated confectionery having toffee fillings; Non-medicated confectionery having a milk flavour; Mint flavoured confectionery (Non-medicated -); Non-medicated confectionery containing chocolate; Non-medicated chocolate confectionery; Non-medicated chocolate; Snack foods consisting principally of confectionery; Graham crackers; Cheese-flavored biscuits; Confectionery chips for baking; Chocolate coated macadamia nuts; Coated nuts [confectionery]; Chocolate-coated nuts; Frozen yogurt pies; Cocoa based creams in the form of spreads; Custard; Bread pudding; Wafered pralines; Viennoiserie; Foods with a cocoa base; Chocolate based products; Cinnamon rolls; Pancakes; Fried dough twists; Foodstuffs containing cocoa [as the main constituent]; Foodstuffs containing chocolate [as the main constituent]; Jam buns; Peanut brittle; Chocolate coated fruits; Peanut confectionery; Halvah; Custards [baked desserts]; Rusks; Rusks; Snack food products made from rusk flour.

3. Elbisco claims that Kerangus' applied-for mark is similar to Elbisco's registration UK00003255468 and for identical or similar goods. The opposition is directed against all of the goods applied for by Kerangus.
4. Kerangus filed a Defence and Counterstatement in which it denies that there is a likelihood of confusion between the parties' marks, irrespective of any identity and/or similarity that might be found between the parties' goods.
5. On 4 April 2022, Kerangus applied to invalidate the registration upon which Elbisco seeks to rely in the Opposition, pursuant to sections 47(2)(a) and 5(2)(b) of the Act. Kerangus relies on the following earlier registration:

UK00003700115



Filing date: 24 September 2021

Date of entry in register: 11 March 2022

Priority date: 17 June 2016 (European Union Intellectual Property Office)

Relying on the following goods:

Class 29:

Meat, and game meat; meat extracts; charcuterie; bacon; sausages; ham, canned meat, poultry, fish, fish fillets, preserved fish; pulses, beans, lentils, peas, chickpeas; butter, peanut butter; milk, milk products, cheese, cheese products, yoghurt, cream, whipped cream; edible oils and fats, edible fats, edible oils, corn oil, maize oil for food, margarine, olive oil, sunflower oil, palm oil, sesame oil,

olive paste; eggs; frozen foods included in this class; preserved, dried and cooked fruits and vegetables; boiled vegetables, vegetable broths, canned food, pickled vegetable salads; tomato paste, vegetable salads, canned mushrooms; canned fruits, jellies, fruit salads, fruit pulp, jellies, jams, compotes; raisins, dried figs; soups, vegetable soups, soy milk, tahini; Nuts, walnuts, almonds, peanuts, roasted chickpeas, hazelnuts, sunflower seeds, pumpkin seeds; spoon sweets.

Class 30:

Coffee, coffee substitutes, tea, cocoa, sugar, fructose, rice, tapioca, soy flour, flour and preparations made from wheat and cereals, sago, honey-sesame candy bars, yeast, baking powder, all types of dough, dough flour, pancakes; dough for pies and pizzas, croissants; filo pastry for pies and sweets; corn flour, semolina, cereal flakes, corn flakes, oat flakes, muesli, frumenty (kind of traditional pasta), popcorn, bread, bakery goods, sourdough bread, toast rolls, toast, crackers, biscuits, cookies, rusks, cakes, pastries, pastes, ice-creams, chocolates, chocolate paste and hazelnut paste, wafers, pralines, chocolate drinks, cocoa drinks; barley, corn; honey, molasses syrup; salt, pepper, spices, anise, condiments, mustard, ketchup, mayonnaise, vinegar; ice; chewing gum, candies; halva, syrups, pasta, lasagna.

6. Kerangus claims that Elbisco's registration UK00003255468 is similar to Kerangus' earlier registration UK00003700115 and registered for identical and similar goods, resulting in a likelihood of confusion between the marks.
7. Elbisco filed a Defence and Counterstatement in which it denies that the parties' marks or specifications are similar, and argues that there is, therefore, no likelihood of confusion between the respective marks.
8. Kerangus is represented by Marks & Clerk LLP. Elbisco is represented by Ellinas Brothers Company LTD. The two actions have been consolidated and will be dealt with in this single decision.
9. Both parties have filed evidence and written submissions in the evidence rounds. Kerangus' evidence comes from Mr Graeme Murray, a Chartered Trade Mark

Attorney of the representative for Kerangus. Mr Murray’s Witness Statement is dated 30 January 2023 and focuses mainly on the presence of Greek, Cypriot, Bulgarian and Russian speakers in the UK who will, it is argued, understand Greek. Elbisco’s evidence, filed in reply, comes from Ms Aikaterini Mouzaki, legal representative of Elbisco. Ms Mouzaki’s Witness Statement is dated 15 May 2023 and is a vehicle for exhibiting two earlier decisions of the EUIPO.¹ The first of these is adduced to support Elbisco’s argument that the mark that Kerangus has applied for is descriptive. I will not summarise the evidence here, but I confirm that I have read it in its entirety and will refer to it in my decision to the extent that it is necessary. A hearing was neither requested nor deemed necessary. Written submissions in lieu of a hearing have been filed by Kerangus only. The following decision has been written after careful consideration of the papers before me.

Decision

Legislation and related case law

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

“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.”

¹ Decisions of the EUIPO are not binding on this Tribunal. Furthermore, Elbisco has not brought an opposition on the grounds of descriptiveness. Any registered mark must be assumed to have at least the minimum degree of distinctiveness.

11. For the invalidation application, section 5(2)(b) is relevant under the provisions of section 47 of the Act. These are as follows:

“47. (1) [...]

(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.

(2ZA) [...]

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

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

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

(c) the use conditions are met.

2B) The use conditions are met if –

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

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

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

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

....

(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.

12. In the case of the Application for Invalidation, Kerangus' mark is an earlier mark because the date from which it claims priority (17 June 2016) fell before the filing date of Elbisco's mark (8 September 2017). In the case of the Opposition, Elbisco's mark is an earlier mark by virtue of its filing date (8 September 2017) which fell before the date on which the contested application was filed (4 June 2021).

13. Section 6A of the Act provides that where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the application date of the applied-for mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged, because the earlier mark was registered for less than 5 years on the date on which Kerangus filed its application for registration of its opposed mark. In the case of the Application for Invalidation, Kerangus may have been required to prove use of its earlier mark if it had been registered for less than five years on the date on which the Application for Invalidation was filed. This was 4 April 2022, just a few weeks after the registration process was completed. Kerangus is therefore

entitled to rely upon all of the goods that it seeks to rely upon for the Application for Invalidation.

14. The following principles are derived from the decisions of the Court of Justice of the European Union² (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97; *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-3/03; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C120/04; *Shake di L. Laudato & C. Sas v OHIM*, Case C-334/05P; and *Bimbo SA v OHIM*, Case C-591/12P.

The principles:

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks

² 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.

bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

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

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

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

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The Invalidation proceedings CA504749

15. The invalidation action will be dealt with first because the contested mark is being relied upon by Elbisco in the Opposition proceedings against Kerangus and the outcome will, therefore, have a bearing on the Opposition proceedings.

Comparison of the marks

Kerangus' earlier mark:	Elbisco's contested mark:
<p data-bbox="204 719 448 752">UK00003700115</p> 	<p data-bbox="809 719 1051 752">UK00003255468</p> 

16. 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.”

17. 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.

Overall impression of the marks

18. It is not disputed that the word element of the earlier mark is, in fact, a Greek word. Kerangus has submitted that there are two groups of average UK consumers; one group who will understand the Greek alphabet and another group who will not.³ Mr Murray's Witness Statement introduces a BBC article published in 2021 according to which there are said to be 'more than a hundred Greek communities across the UK'.⁴ The article states that the most significant settlement is in London where there are between 150,000 and 180,000 Greek speakers.⁵ Whilst I accept that there is a significant Greek presence in London, and I have no reason to doubt that there may be Greek communities in other parts of the UK, it is my view that, as a proportion of the general population of UK consumers, this group of consumers will be relatively small. I must be prudent not to ascribe a greater knowledge to the UK average consumer than is warranted.⁶ I consider that the vast majority of average UK consumers would not understand Greek characters and would deem the earlier mark to comprise the word element 'ANNA', followed by an exclamation mark, in a minimally stylised typeface, set against a solid black background edged in a white surround. The third character resembles an inverted 'v' but would, in my view, be presumed to be an 'n' by the average UK consumer. In my view, the central word element plays the greater role in the overall impression of the mark, owing to its size, while the background and border play a much lesser role.

³ Kerangus' written submissions of 30 January 2023, at [11].

⁴ Witness Statement of G. Murray, Exhibit GM3.

⁵ As above.

⁶ In *Wunderkind Trade Mark* [2002] R.P.C. 45, the registrar refused to attribute knowledge of the German meaning of the word 'Wunderkind' to UK consumers, despite evidence of a small number of uses of that word in UK press articles, a decision which was upheld by the High Court.

19. The contested mark comprises two word elements set against a grainy blue background featuring a white border, which is in turn surrounded by what might be described as stylised foliage. The word element 'απλά' appears in a larger font relative to the word element 'apla'. Although the element 'απλά' is rendered in a larger font, it is my view that it is the smaller element 'apla' to which the average UK consumer's eye will be drawn first. I consider that 'apla' will be readily articulable by the average UK consumer, whereas the word "απλά", for reasons provided above, will not be capable of articulation by a significant proportion of average UK consumers. I therefore find that 'apla' will make the greatest contribution to the overall impression of the mark. The border and colours are, to my mind, purely decorative and would make a lesser contribution to the overall impression.

Visual comparison

20. In both marks, the text elements are set against backgrounds and surrounded by a border of some sort. Both marks feature word elements of four characters beginning and ending in 'a', i.e. 'ANNA' versus 'απλά' and 'apla'. The points of visual difference are:

- The earlier mark comprises one word element compared to the contested mark which has two word elements;
- The 'ANNA' element in the earlier mark comprises a different combination of characters as compared to the elements 'απλά' and 'apla' in the contested mark;
- The presence of the exclamation mark in the earlier mark, which is absent from the contested mark;
- The presence of the solid black background edged in white in the earlier mark as compared to the mottled blue background with the white border which is, in turn, bordered by stylised foliage.

All things considered, I find the parties' marks to have a very low level of visual similarity.

Aural comparison

21. It is common ground between the parties that both marks comprise words in the Greek language.⁷ Kerangus argues that, for average consumers who understand Greek, “the common element will be pronounced as ‘APLA’”;⁸ whereas those who do not understand Greek will “pronounce the common element as ‘ANNA’”. Elbisco argues that Elbisco’s mark will be pronounced as two words and that the parties’ marks are, therefore, ‘aurally very different’.⁹
22. I must make my aural comparison from the standpoint of the average consumer in the UK. I note from the decision of the European Union Intellectual Office (‘EUIPO’) in ‘opposition No B 2 928 177’, exhibited at GM8 to Mr Graeme’s Witness Statement, which relates to the marks in issue in the instant proceedings, that the elements ‘απλά’ and ‘apla’ are aurally identical for consumers who understand the Greek language. However, as noted earlier at [18], I consider the group of average consumers who understand the Greek language to be a relatively small proportion of UK consumers as a whole. In my view, the average UK consumer will articulate the earlier mark as ‘ANNA’. I find that the first element of the contested mark, ‘απλά’, will, for the average UK consumer, be inarticulable. The only element that will be articulated will, in my view, be the ‘apla’ element. I therefore find the marks will likely be articulated as ‘ANNA’ versus ‘APLA’. The aural differences between these elements will, in my view, be particularly apparent due to both being short marks. I find the parties’ marks to have a low level of aural similarity.

Conceptual comparison

23. Kerangus has submitted that the Greek word present in both marks means ‘Simply’, but has conceded that, for consumers unfamiliar with Greek, there will be no conceptual aspect to the marks.¹⁰

⁷ Written submissions of Kerangus, dated 30 January 2023, para [21]; Written submissions of Elbisco, dated 30 January 2023, para [B1].

⁸ Written submissions of Kerangus, dated 30 January 2023, paras [17] – [20]; Written submissions of Elbisco, dated 30 January 2023, para [B2].

⁹ Written submissions of Elbisco, dated 30 January 2023, para [B2].

¹⁰ Written submissions of Kerangus, dated 30 January 2023, para [21].

24. I find that, although UK consumers familiar with Greek may understand both marks to convey the word 'simply', this proportion of the body of UK consumers as a whole, will be small. The vast majority of average UK consumers, in my view, will not understand Greek and will therefore not perceive this meaning. I find that the earlier mark will be perceived as the female name 'Anna' whereas the contested mark will likely be perceived as 'a non-English' word followed by the made-up word 'Apla'. I therefore find the parties' marks to be conceptually different.

Comparison of goods

25. The goods to be compared are as follows:

Kerangus' earlier mark:	Elbisco's contested mark:
<p>Class 29: <i>Meat, and game meat; meat extracts; charcuterie; bacon; sausages; ham, canned meat, poultry, fish, fish fillets, preserved fish; pulses, beans, lentils, peas, chickpeas; butter, peanut butter; milk, milk products, cheese, cheese products, yoghurt, cream, whipped cream; edible oils and fats, edible fats, edible oils, corn oil, maize oil for food, margarine, olive oil, sunflower oil, palm oil, sesame oil, olive paste; eggs; frozen foods included in this class; preserved, dried and cooked fruits and vegetables; boiled vegetables, vegetable broths, canned food, pickled vegetable salads; tomato paste, vegetable salads, canned mushrooms; canned fruits, jellies, fruit salads, fruit</i></p>	<p>Class 30: <i>Bread; Hushpuppies [breads]; Unleavened bread; Unleavened bread in thin sheets; Bread flavoured with spices; Bread with sweet red bean; Unfermented bread; Matzo; Pitta bread; Bread casings filled with fruit; Tortilla shells; Malted bread mix; Danish bread; Danish bread rolls; Empanadas; Oat cakes for human consumption; Tea cakes; Barm cakes; Bagels; Thin breadsticks; Soft rolls [bread]; English muffins; Crispbread snacks; Semi-baked bread; Baguettes; Oat biscuits for human consumption; Bread biscuits; Biscuits [sweet or savoury]; Aperitif biscuits; Onion or</i></p>

pulp, jellies, jams, compotes; raisins, dried figs; soups, vegetable soups, soy milk, tahini; Nuts, walnuts, almonds, peanuts, roasted chickpeas, hazelnuts, sunflower seeds, pumpkin seeds; spoon sweets.

Class 30:

Coffee, coffee substitutes, tea, cocoa, sugar, fructose, rice, tapioca, soy flour, flour and **preparations made from wheat and cereals**, sago, honey-sesame candy bars, yeast, baking powder, **all types of dough, dough flour, pancakes; dough for pies and pizzas, croissants; filo pastry for pies and sweets; corn flour, semolina, cereal flakes, corn flakes, oat flakes, muesli, frumenty (kind of traditional pasta), popcorn, bread, bakery goods, sourdough bread, toast rolls, toast, crackers, biscuits, cookies, rusks, cakes, pastries, pastes, ice-creams, chocolates, chocolate paste and hazelnut paste, wafers, pralines, chocolate drinks, cocoa drinks; barley, corn; honey, molasses syrup; salt, pepper, spices, anise, condiments, mustard, ketchup, mayonnaise, vinegar; ice; chewing gum, candies; halva, syrups, pasta, lasagna.**

cheese biscuits; Jam filled brioches; Nan bread; Taco shells; Multigrain bread; Pre-baked bread; Garlic bread; Scones; Currant bread; Pykelets; Crumpets; Croutons; Tortillas; Toasted bread; Breadcrumbs; Crisp breads; Sandwich wraps [bread]; Fresh bread; Fruited malt loaf; Rusks; Dutch rusk; Toasts [biscuits]; Thick breadsticks; Crumb; Bread rolls; Cornflour bread rolls (almojábana); Steamed bread; Buns; Bacon buns; Malt bread; Bread and buns; Filled bread rolls; Bread with soy bean; Fruit breads; Low-salt bread; Wholemeal bread; Pumpernickel; Flat bread; Soda bread; Gluten-free bread; Pastries, cakes, tarts and biscuits (cookies); Hardtack [biscuits]; Salted tarts; Chocolate covered pretzels; Savory pastries; Macaroons [pastry]; Danish butter cookies; Milk chocolate teacakes; Fried dough cookies; Wafers; Wafers [food]; Flan base wafers; Bean-jam filled wafers (monaka); Chocolate caramel wafers; Rolled wafers [biscuits]; Chocolate wafers; Almond pastries; Viennese pastries; Fruit filled pastry products; Orange based pastry; Pastries containing creams and

	<p><i>fruit; Pastries containing fruit; Sweet biscuits for human consumption; Dutch gingerbread (taai taai); Chocolate pastries; Danish pastries; Prepared desserts [pastries]; Tarts [sweet or savoury]; Meringues; Strawberry gateaux; Flour confectionery; Edible wafers; Pastry shells for monaka; Pastry dough; Shortcrust pastry; Puff pastry; Pâtés en croûte; Vol-au-vent cases; Almond cake; Frozen yogurt cakes; Steamed sponge cakes (fagao); Malt cakes; Frozen pastries; Frozen pastry sheets; Frozen pastry stuffed with meat and vegetables; Frozen pastry stuffed with vegetables; Breakfast cake; Treacle tarts; Plum-cakes; Quiches; Pumpkin pies; Shortbread part coated with chocolate; Shortbread part coated with a chocolate flavoured coating; Shortbread with a chocolate flavoured coating; Crème brûlées; Crepes; Meat pies; Meat pies [prepared]; Brittle; Pie shells; Doughnuts; Cookie mixes; Long-life pastry; Madeleines; Apple tarts; Muffins; Cupcakes; Fruit cake snacks; Biscuits for human consumption made from malt; Biscuits for human consumption made from cereals; Petit-beurre</i></p>
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biscuits; Shortbread with a chocolate coating; Biscuits flavoured with fruit; Biscuits having a chocolate flavoured coating; Biscuits with an iced topping; Biscuits having a chocolate coating; Half covered chocolate biscuits; Biscuits containing fruit; Fortune cookies; Biscuits containing chocolate flavoured ingredients; Sponge fingers [cakes]; Chocolate biscuits; Gingerbread nuts; Chocolate covered wafer biscuits; Brownies; Brioches; Fresh pasties; Fresh sausage rolls; Fresh pies; Biscuits for cheese; Pies; Pies [sweet or savoury]; Vegetable pies; Egg pies; Pastries containing creams; Cream pies; Non-meat pies; Pies containing meat; Pies containing vegetables; Fruit cakes; Egg roll cookies; Petits fours [cakes]; Savarins; Samosas; Pot pies; Flaky pastry containing ham; Vol-au-vents; Tarts; Egg tarts; Covered tarts; Custard tarts; Fried dough cookies (karintoh); Deep chocolate cake made with chocolate sponge; Chocolate cakes; Cream buns; Pastry shells; Gingerbread; Cereal bars and energy bars; Cereal cakes for human consumption; Snack

	<p><i>foods made from corn and in the form of rings; Snack foods made of whole wheat; Cereal-based snack food; Rice-based snack food; Snacks manufactured from muesli; Granola-based snack bars; Snack bars containing a mixture of grains, nuts and dried fruit [confectionery]; Snack foods consisting principally of extruded cereals; Cereal based energy bars; Cereal preparations consisting of bran; Cereal preparations consisting of oatbran; Cereal preparations coated with sugar and honey; Cereal products in bar form; Cereal bars; High-protein cereal bars; Muesli bars; Cereal based food bars; Bars based on wheat; Sopapillas [fried pastries]; Salted wafer biscuits; Salt crackers; Salted biscuits; Savory biscuits; Boiled confectionery; Panned sweets (Non-medicated -); Crumble; Sweetmeats; Prepared desserts [confectionery]; Bakery goods; Potato flour confectionery; Orange based confectionery; Confectionery having wine fillings; Dairy confectionery; Chocolate flavoured confectionery; Confectionery items coated with chocolate; Confectionery containing jelly; Nut confectionery; Confectionery having</i></p>
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	<p>liquid spirit fillings; Confectionery having liquid fruit fillings; Confectionery containing jam; Chocolate confectionery having a praline flavour; Chocolate confectionery containing pralines; Chocolate-based spreads; Chocolate spreads containing nuts; Muesli desserts; Prepared desserts [chocolate based]; Sweetmeats [candy]; Flavoured sugar confectionery; Biscotti dough; Canapes; Waffles; Crackers; Crackers flavoured with fruit; Croissants; Turkish delight coated in chocolate; Chocolate coated nougat bars; Nougat; Non-medicated flour confectionery; Non-medicated flour confectionery containing imitation chocolate; Non-medicated flour confectionery coated with imitation chocolate; Non-medicated flour confectionery coated with chocolate; Non-medicated flour confectionery containing chocolate; Non-medicated confectionery containing milk; Non-medicated confectionery having toffee fillings; Non-medicated confectionery having a milk flavour; Mint flavoured confectionery (Non-medicated -); Non-medicated confectionery containing chocolate; Non-medicated</p>
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	<p>chocolate confectionery; Non-medicated chocolate; Snack foods consisting principally of confectionery; Graham crackers; Cheese-flavored biscuits; Confectionery chips for baking; Chocolate coated macadamia nuts; Coated nuts [confectionery]; Chocolate-coated nuts; Frozen yogurt pies; Cocoa based creams in the form of spreads; Custard; Bread pudding; Wafered pralines; Viennoiserie; Foods with a cocoa base; Chocolate based products; Cinnamon rolls; Pancakes; Fried dough twists; Foodstuffs containing cocoa [as the main constituent]; Foodstuffs containing chocolate [as the main constituent]; Jam buns; Peanut brittle; Chocolate coated fruits; Peanut confectionery; Halvah; Custards [baked desserts]; Rusks; Rusks; Snack food products made from rusk flour.</p>
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26. Kerangus has submitted that the terms marked in bold text are identical whereas the terms left in standard text are similar. Elbisco submits that there is no similarity between the parties' goods.

27. Section 60A of the Act provides:

(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the 'Nice Classification' means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.

28. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties' goods and services must be taken into account:

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

29. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281¹¹, identified the following factors for assessing similarity of the respective goods and services:

(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;

¹¹ *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

(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.

30. Goods (or services) may be grouped together for the purposes of assessment, as Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, said in *Separode Trade Mark* BL O-399-10:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

31. In making an assessment between the competing goods and services, I bear in mind the decision of the General Court (“GC”) in *Gérard Meric v Office for Harmonisation in the Internal Market*.¹² The GC held to the effect that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application and vice versa.

32. Case law establishes that “... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise” but “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

¹² Case T-133/05

language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”¹³

33. As noted above, Kerangus has identified which of Elbisco’s goods it considers to be identical to its own goods. For clarity, I set out below which of them I find to be identical, either by virtue of being synonymous terms or identical according to the principle in ‘Meric’, and where the points of similarity lie:

Kerangus’ earlier mark:	Elbisco’s contested mark:
Bakery goods	<i>Bread; Hushpuppies [breads]; Unleavened bread; Unleavened bread in thin sheets; Bread flavoured with spices; Bread with sweet red bean; Unfermented bread; Matzo; Pitta bread; Bread casings filled with fruit; Danish bread; Danish bread rolls; Empanadas; Oat cakes for human consumption; Tea cakes; Barm cakes; Bagels; Thin breadsticks; Soft rolls [bread]; English muffins; Semi-baked bread; Baguettes; Oat biscuits for human consumption; Bread biscuits; Biscuits [sweet or savoury]; Aperitif biscuits; Onion or cheese biscuits; Jam filled brioches; Nan bread; Multigrain bread; Pre-baked bread; Garlic bread; Scones; Currant bread; Pykelets; Crumpets; Toasted bread; Crisp breads; Sandwich</i>

¹³ *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch).

wraps [bread]; Fresh bread; Fruited malt loaf; Rusks; Dutch rusk; Toasts [biscuits]; Thick breadsticks; Bread rolls; Cornflour bread rolls (almojábana); Steamed bread; Buns; Malt bread; Bread and buns; ; Bread with soy bean; Fruit breads; Low-salt bread; Wholemeal bread; Pumpernickel; Flat bread; Soda bread; Gluten-free bread; Pastries, cakes, tarts and biscuits (cookies); Hardtack [biscuits]; Salted tarts; Chocolate covered pretzels; Savory pastries; Macaroons [pastry]; Danish butter cookies; Milk chocolate teacakes; Fried dough cookies; Wafers; Wafers [food]; Flan base wafers; Bean-jam filled wafers (monaka); Chocolate caramel wafers; Rolled wafers [biscuits]; Chocolate wafers; Almond pastries; Viennese pastries; Fruit filled pastry products; Orange based pastry; Pastries containing creams and fruit; Pastries containing fruit; Sweet biscuits for human consumption; Dutch gingerbread (taai taai); Chocolate pastries; Danish pastries; Prepared desserts [pastries]; Tarts [sweet or savoury]; Meringues; Strawberry gateaux; Edible wafers; Pastry

	<p><i>shells for monaka; Pastry dough; Shortcrust pastry; Puff pastry; Pâtés en croûte; Vol-au-vent cases; Almond cake; Steamed sponge cakes (fagao); Malt cakes; Frozen pastries; Frozen pastry sheets; Frozen pastry stuffed with meat and vegetables; Frozen pastry stuffed with vegetables; Breakfast cake; Treacle tarts; Plum-cakes; Quiches; Pumpkin pies; Shortbread part coated with chocolate; Shortbread part coated with a chocolate flavoured coating; Shortbread with a chocolate flavoured coating; Crème brûlées; Meat pies; Meat pies [prepared]; Pie shells; Doughnuts; Long-life pastry; Madeleines; Apple tarts; Muffins; Cupcakes; Fruit cake snacks; Biscuits for human consumption made from malt; Biscuits for human consumption made from cereals; Petit-beurre biscuits; Shortbread with a chocolate coating; Biscuits flavoured with fruit; Biscuits having a chocolate flavoured coating; Biscuits with an iced topping; Biscuits having a chocolate coating; Half covered chocolate biscuits; Biscuits containing fruit; Fortune cookies;</i></p>
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	<p><i>Biscuits containing chocolate flavoured ingredients; Sponge fingers [cakes]; Chocolate biscuits; Gingerbread nuts; Chocolate covered wafer biscuits; Brownies; Brioches; Fresh pasties; Fresh sausage rolls; Fresh pies; Biscuits for cheese; Pies; Pies [sweet or savoury]; Vegetable pies; Egg pies; Pastries containing creams; Cream pies; Non-meat pies; Pies containing meat; Pies containing vegetables; Fruit cakes; Egg roll cookies; Petits fours [cakes]; Savarins; Samosas; Pot pies; Flaky pastry containing ham; Vol-au-vents; Tarts; Egg tarts; Covered tarts; Custard tarts; Fried dough cookies (karintoh); Deep chocolate cake made with chocolate sponge; Chocolate cakes; Cream buns; Pastry shells; Gingerbread; Cereal cakes for human consumption; Sopapillas [fried pastries]; Crumble; Bakery goods; Cinnamon rolls; Fried dough twists; Cheese-flavored biscuits; Rusks;¹⁴ Custards [baked desserts]; Waffles; Prepared desserts [chocolate based]</i></p>
<i>cakes</i>	<i>Frozen yogurt cakes</i>

¹⁴ 'Rusks' appears twice in the specification.

<i>pancakes</i>	<i>Pancakes</i> <i>Crepes; Tortillas</i>
<i>all types of dough</i>	<i>Pastry dough; Biscotti dough</i>
<i>preparations made from wheat and cereals</i>	<i>Cereal preparations coated with sugar and honey</i> <i>Snack foods made from corn and in the form of rings; Snack foods made of whole wheat; Cereal-based snack food; Rice-based snack food;</i> <i>Cereal bars and energy bars; Snack foods consisting principally of extruded cereals; Cereal based energy bars; Cereal preparations consisting of bran; Cereal preparations consisting of oatbran;</i> <i>Cereal products in bar form; Cereal bars; High-protein cereal bars; Cereal based food bars; Bars based on wheat; Snack food products made from rusk flour</i>
<i>chocolate paste</i>	<i>Chocolate-based spreads;</i> <i>Chocolate spreads containing nuts</i>
<i>candies</i> ¹⁵	<i>Chocolate flavoured confectionery;</i> <i>Confectionery items coated with</i>

¹⁵ I understand 'candies' to be synonymous with 'sweets'.

	<p><i>chocolate; Chocolate confectionery having a praline flavour; Chocolate confectionery containing pralines; Turkish delight coated in chocolate; Chocolate coated nougat bars; Non-medicated flour confectionery coated with chocolate; Non-medicated flour confectionery containing chocolate; Non-medicated confectionery containing chocolate; Non-medicated chocolate confectionery; Non-medicated chocolate; Flour confectionery; Brittle; Chocolate based products</i></p>
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34. I disagree with Kerangus' argument that the following of Elbisco's goods are identical to the those under the earlier mark; they are neither synonymous, nor identical according to the principle in 'Meric':

Class 30: Malted bread mix; Croutons; Breadcrumbs; Crumb; Bacon buns; Filled bread rolls; Cookie mixes; Muesli desserts; Frozen yogurt pies; Chocolate coated macadamia nuts; Chocolate-coated nuts; Snack food products made from rusk flour; Foodstuffs containing cocoa [as the main constituent]

I will therefore assess their level of similarity applying the usual 'Treat' factors.

Contested goods: ***Chocolate coated macadamia nuts; Chocolate-coated nuts***

35. I compare these goods to Kerangus' class 30 term *candies*. It is my understanding that 'candies' is synonymous with sweets or chocolates. The parties' goods will have a shared purpose, i.e. as sweet treats. Users will overlap, both goods being purchased by the general public. Trade channels will also overlap; both will be sold in the same physical shops and their online equivalents. Where the goods are sold in the same physical shops, I consider that the goods will likely be found in the same section (i.e. the sweets or confectionery section), sometimes on the same shelves. Methods of use will be the same. The parties' goods will also be similar in nature, both comprising small sweet treats typically packaged in small bags. I consider the goods to be in competition; one might deliberate over whether to purchase chocolate-coated nuts over some other sweets/chocolates. I do not find complementarity, neither good being necessary or important for the other. I find the parties' goods to be highly similar.

Contested goods: ***Croutons; Breadcrumbs; Crumb***

36. The contested goods are made from bread and typically used as cooking ingredients or toppings for dishes. I compare these goods to Kerangus' class 30 term *bread*. The parties' goods will differ in terms of their specific purposes; bread is typically intended to be used as an accompaniment to a meal or to make sandwiches/filled rolls, whereas the contested goods tend to be used as ingredients or toppings. Users and trade channels will be shared; both goods will be purchased by the general public and sold in supermarkets/food shops and their online equivalents. The parties' goods will differ in their methods of use and physical natures. I do not find the goods to be in a competitive relationship; neither party's goods being substitutable for each other. I do not find complementarity, either; although bread is a necessary ingredient of the contested goods, the average consumer would unlikely presume both offerings to derive from the same undertaking. I find the parties' goods to have no more than a medium level of similarity.

Contested goods: ***Bacon buns; Filled bread rolls***

37. I compare the contested goods to Kerangus' *bread*. The specific purposes of the parties' goods will differ; the contested goods are 'ready-to-eat' items whereas bread is intended to be consumed with a meal or made into sandwiches, for example. Both parties' goods will be purchased by the general public. Trade channels will overlap; both will likely be sold in supermarkets/shops and their online equivalents. Methods of use will be different; a filled roll/bacon bun will be consumed as it is, whereas bread will likely be sliced or filled with other foods. The goods will differ in physical nature; bread will typically be sold in the form of loaves or rolls as compared to Kerangus' buns/rolls containing fillings. I do not find the parties' goods to be in competition, neither being a realistic substitute for the other. I do not find complementarity, either; although bread is necessary to make the contested goods, I consider it unlikely that the average consumer would presume both parties' offerings to originate from the same undertaking. I find the parties' goods to have no more than a medium level of similarity.

Contested goods: ***Malted bread mix; Cookie mixes***

38. I compare the contested goods to Kerangus' class 30 term *bakery goods*. 'Bakery goods' will, to my mind, include foods such as bread, pies and cakes. The purposes of the parties' goods will be distinct; the contested goods are intended to be 'made up' into bread/cookies, whereas bakery goods will typically be ready for immediate consumption or use. Users will overlap; both offerings will be purchased by the general public. Trade channels will also overlap; both will be sold via the same supermarkets/shops and their online equivalents. The goods will differ in terms of their methods of use and physical natures. I do not find the goods to be competitive, neither being substitutable for the other. I do not find complementarity, either; although the contested goods can be made up into breads/cookies, which are bakery goods, the average consumer would unlikely presume both parties' goods to originate from the same undertaking. I find the parties' goods to have a low level of similarity.

Contested goods: ***Muesli desserts***

39. I compare these goods to Kerangus' class 30 term *muesli*. I note that no submissions have been made as to what 'muesli desserts' are. The contested goods are, to my mind, desserts for which muesli is a main ingredient. The parties' goods will differ in specific purposes; 'muesli' is typically eaten as a breakfast meal whereas 'muesli desserts' will likely be consumed after a main course. Users and trade channels will be shared; both will be purchased by the general public, from the same supermarkets/shops and their online equivalents. Methods of use will overlap to the extent that both goods are 'ready to eat', albeit that muesli will typically be eaten at breakfast time. The goods will likely differ in terms of their physical natures; muesli is typically packed in a box or bag as a breakfast 'cereal', whereas a dessert will likely be in the form of a 'dish' in a tray or some sort of casing in the manner of a cake or pie. I do not find the goods to be competitive or complementary; neither is substitutable for each other, and the average consumer would unlikely presume the same undertaking to be responsible for both muesli as a breakfast as well as muesli 'desserts'. I find the parties' goods to have a low level of similarity.

Contested goods: ***Frozen yogurt pies***

40. I compare the contested goods to Kerangus' class 30 term *ice-creams*. The goods will have the same purpose, i.e. both are intended to be consumed as desserts. Users and trade channels will be shared. Where the goods are sold in physical shops, both will be found in the 'frozen desserts' section, and may even be found side-by-side in the freezers. The goods will have the same methods of use, i.e. as desserts. Their physical natures will be similar in that ice cream and frozen yoghurt have a similar consistency, albeit the contested goods will be in the form of 'pies'. I find the parties' goods to be competitive; one might deliberate over whether to purchase a tub of ice cream over a frozen yoghurt pie as a dessert. I do not find the goods to be complementary; neither being necessary or important for each other. I find the parties' goods to be highly similar.

Contested goods: ***Snack food products made from rusk flour.***

41. I understand that 'rusk flour' is a powder made from dry hard bread. Bearing in mind the purposes, users, trade channels, physical natures and methods of use of the parties' goods, and considering the matters of competition and complementarity, I do not find the contested goods to bear any level of similarity to any of Kerangus' goods.¹⁶ I find the parties' goods and services to be dissimilar.

Contested goods: *Tortilla shells; Taco shells*

42. The contested goods are crispy 'shells' typically made from corn flour and are intended to be filled with other foods, especially in Mexican cuisine. I compare these goods to the Kernagus' class 30 term *pancakes*. The parties' respective goods will overlap in purpose to the extent that both are typically filled with other foods, albeit 'pancakes' also often tend to have 'toppings' added to them. Users and trade channels will overlap. The goods will sometimes overlap in methods of use where both parties' offerings have 'fillings' added to them. The parties' offerings will differ in physical nature to the extent that the contested goods will be hard shells as opposed to pancakes which are typically soft. Although both parties' offerings can be filled, I do not consider them to be realistic substitutes for each other; pancakes are more often than not eaten as a 'sweet' whereas tortilla and taco shells are typically eaten as a savoury food. There is no complementarity between the parties' goods; neither being necessary or important for the other. I find the parties' goods to have a low level of similarity.

Contested goods: *Crispbread snacks*

43. I note that Kerangus has argued that the contested goods are 'highly similar' to its goods (albeit it has not identified where the similarity lies). I take the view that the contested goods will be encompassed by Kerangus' class 30 term *crackers*, which, strictly speaking, would make the goods identical according to the principle in 'Meric'. However, it is not appropriate for me to raise Kerangus' case

¹⁶ I do not consider a comparison to Kerangus' class 30 term *rusks* to improve Kerangus' position because rusks (i.e. the hard biscuits) are made from wheat flour and not rusk flour.

above that which it has pleaded. I therefore find the parties' goods to be highly similar.

Contested goods: *Snacks manufactured from muesli; Granola-based snack bars; Snack bars containing a mixture of grains, nuts and dried fruit [confectionery]; Muesli bars*

44. The contested goods will be consumed as snacks. I compare these goods to Kerangus' class 30 term *biscuits*. The parties' goods will overlap in purpose; both parties' offerings will be typically consumed as a snack. Users and trade channels will coincide. The parties' goods will, in many cases, overlap in terms of their physical nature; both biscuits and goods encompassed by the contested terms may be in the form of flat crunchy or chewy items of a comparable size. Methods of use will be the same. I consider the parties' respective offerings to be in a competitive relationship; one might deliberate over whether to purchase biscuits or a product encompassed by one of Elbisco's terms. There is no complementarity; neither party's offering is necessary or important for the other. I find the parties' goods to be highly similar.

Contested goods: *Salted wafer biscuits; Salted biscuits; Savory biscuits;*

45. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. The contested goods will be encompassed by the class 30 term *biscuits*. For the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Salt crackers; Graham crackers; Crackers; Crackers flavoured with fruit*

46. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. The contested goods will be encompassed by the class 30 term *crackers*. For the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Boiled confectionery; Panned sweets (Non-medicated -); Potato flour confectionery; Orange based confectionery; Confectionery having*

wine fillings; Dairy confectionery; Confectionery containing jelly; Nut confectionery; Confectionery having liquid spirit fillings; Confectionery having liquid fruit fillings; Confectionery containing jam; Sweetmeats; Sweetmeats [candy]; Flavoured sugar confectionery; Nougat; Non-medicated flour confectionery; Non-medicated flour confectionery containing imitation chocolate; Non-medicated flour confectionery coated with imitation chocolate; Non-medicated confectionery containing milk; Non-medicated confectionery having toffee fillings; Non-medicated confectionery having a milk flavour; Mint flavoured confectionery (Non-medicated -); Peanut brittle; Peanut confectionery; Snack foods consisting principally of confectionery

47. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. The contested goods will be encompassed by the class 30 term *candies*. For the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Confectionery chips for baking*

48. To my mind, the contested goods will typically encompass chocolate chips which are added to cake or cookie mixtures before cooking. I compare the contested goods to Kerangus' class 30 term *chocolates*. The parties' goods will differ in terms of their purposes; 'confectionery chips' will be used as cooking ingredients, whereas 'chocolates' will be eaten, as they are, as sweet treats. Users and trade channels will be shared; both will be purchased by the general public from supermarkets and other shops. Although both parties' goods are made of chocolate, the goods will, in most cases, differ in physical nature in that 'confectionery chips' will be in the form of small 'chips' as compared to Kerangus' 'chocolates', which tend to be at least 'bite-sized'. Methods of use will also differ; 'confectionery chips' will typically be used as an ingredient, whereas 'chocolates' are ready to eat.

Contested goods: *Canapes*

49. I understand that 'canapes' are bite-sized food items typically consumed with aperitifs prior to a meal, usually in a formal setting, examples of which might

include vol-au-vents or small crackers with various toppings. I consider that canapes would be encompassed by Kerangus' Class 30 term *bakery goods*. However, for the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Croissants; Viennoiserie; Bread pudding; Jam buns*

50. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. The contested goods will be encompassed by the class 30 term *bakery goods*. For the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Coated nuts [confectionery]; Chocolate coated fruits*

51. For the reasons set out above at [35], I find the contested goods to be highly similar to Kerangus' *candies*.

Contested goods: *Cocoa based creams in the form of spreads*

52. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. The contested goods will be encompassed by the class 30 term *pastes*. For the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Custard*

53. I compare the contested goods to Kerangus' class 30 term *ice-creams*. The purposes of the parties' goods will overlap to the extent that both items are typically consumed as desserts or accompaniments to other dessert items (e.g. apple tart and custard or ice cream). Users will overlap, both parties' goods being purchased by the general public. Trade channels will be shared; both will be sold in the same supermarkets/shops and their online equivalents. Methods of use will overlap to the extent that both custard and ice creams can be used as accompaniments to other dessert items. The goods will, however, differ in terms of their physical nature; ice cream is a frozen foodstuff whereas custard is typically a pourable substance. I find the goods to be competitive in some

instances; dessert menus typically offer a choice of ice cream, custard or cream as an accompaniment to apple pie, for instance. I do not find complementarity between the goods, neither being necessary or important for each other. I find the parties' goods to have no more than a medium level of similarity.

Contested goods: *Wafered pralines*

54. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. The contested goods will be encompassed by the class 30 term *pralines*. For the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Salted wafer biscuits; Salted biscuits; Savory biscuits*

55. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. The contested goods will be encompassed by the class 30 term *biscuits*. For the reason set out above at [43], I find the parties' goods to be highly similar.

Contested goods: *Foods with a cocoa base*

56. It is my understanding that 'foods with a cocoa base' will encompass foods in which cocoa is a main ingredient. I compare these goods to Kerangus' *cocoa drinks*. The specific purposes of the goods will differ in that the contested goods are foods as opposed to Kerangus' cocoa-based beverages. Users and trade channels will overlap. The respective goods will differ in terms of their physical natures; Elbisco's cocoa-based foodstuffs as opposed to Kerangus' cocoa-based beverages. Methods of use will also differ; one good will be eaten whereas the other will be drunk. I do not find the parties' offerings to be in competition, neither being substitutable for the other. I do not find complementarity, either; neither good being necessary or important for the other. I find the parties' offerings to have a low level of similarity.

Contested goods: *Foodstuffs containing chocolate [as the main constituent]*

57. I compare the contested goods to Kerangus' class 30 term **chocolates**. In my view, 'chocolates' may contain other ingredients besides the principal ingredient of chocolate (e.g. nuts, marzipan, alcohol). I consider that Kerangus' 'chocolates' would encompass the contested term. Strictly speaking, the goods will be identical according to the principle in 'Meric'. However, for the reasons provided above at [43], I find the parties' goods to be highly similar.

Contested goods: *Halvah*

58. Kerangus' argument that the contested goods are 'highly similar' to its goods is noted. I note that Kerangus' specification includes the synonymous term *halva*. The respective goods are, strictly speaking, identical. However, for the reason set out above at [43], I find the parties' goods to be highly similar.

Average consumer and the purchasing act

59. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. The word "average" denotes that the person is typical. For the purpose 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 or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

60. The average consumer of the goods at issue in this opposition will be the general public. The purchasing act will be primarily visual. Typically, the goods will be picked up or examined in physical shops, or, in the case of online purchases, product information will be read, before making a purchase. There may also be an aural aspect to the purchasing process where advice is sought from retail staff. In my view, the average consumer would pay no more than a medium level of attention when selecting the goods.

Distinctive character of the earlier mark

61. *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

62. Registered trade marks possess varying degrees of inherent distinctive character: perhaps lower where a mark may be suggestive or allusive of a characteristic of the goods, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities.

63. I have found that a significant proportion of UK consumers will perceive Kerangus’ mark as the female name ‘Anna’. The mark neither describes nor alludes to the goods in respect of which it is registered. I find that the mark has a medium level of inherent distinctive character.

64. The evidence adduced by Kerangus does not include evidence of the use of the earlier mark. I am therefore unable to make an assessment as to whether the earlier mark enjoys an enhanced level of distinctive character.

Likelihood of confusion

65. Confusion can be direct or indirect. Mr Iain Purvis QC, (as he then was) as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v Back Beat Inc*¹⁷. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*¹⁸, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly matches it to the imperfect image of the earlier mark in their ‘mind’s eye’. Indirect confusion occurs when the average consumer recognises that the competing marks are not the same in some respect, but the similarities between them, combined with the goods at issue, leads them to conclude that the goods are the responsibility of the same or an economically linked undertaking.

66. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [14]. When considering all relevant factors ‘in the round’, I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

67. Despite the identity and similarity that I have identified between the parties’ respective goods, my view is that the net effect of the visual, aural and conceptual differences between the marks is sufficient to prevent the average consumer from mistaking one party’s mark for the other. I have found the marks to have only a very low level of visual similarity and a low level of aural similarity. I have found that the average UK consumer will not understand Greek and that the larger word

¹⁷ Case BL O/375/10 at [16].

¹⁸ *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

element of the applied-for mark, 'απλά', will therefore be inarticulable. The only articulable elements of the marks will be 'Anna' versus 'Apla'. There will be no conceptual nexus between the marks; 'Anna' being perceived as the female name and 'apla' being perceived either as a made-up word or a non-English word whose meaning is unknown. I find that there is no likelihood of direct confusion.



68. I now consider whether there is a likelihood of indirect confusion. I note that in the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

69. I have borne in mind *Whyte and Mackay*¹⁹ in which it was held that where an average consumer perceives that a composite mark consists of two or more elements, one of which has a distinctive significance independent of the mark as a whole, confusion may occur as a result of the similarity/identity of that element to the earlier mark. It is my view that the average UK consumer would not see or hear any common element between the marks. It is difficult to see the parties' marks as commercially effective related brands because, for the average UK consumer, neither mark is a logical extension of the other. I can find no proper basis for a finding of a likelihood of indirect confusion.

70. The Application for Invalidation of Elbisco's mark UK00003255486 has failed and the mark therefore survives to be relied upon as an earlier mark in the following opposition.

¹⁹ *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271.

Comparison of the marks

Elbisco's earlier mark:	Kerangus contested mark:
UK00003255468 	UK00003651180 

Overall impression of the marks

71. I adopt the findings of paragraph [19] of this decision in respect of the earlier mark in this Opposition.

72. The contested mark comprises the word element 'APLA', followed by an exclamation mark, in a minimally stylised typeface, set against a solid black background edged in a white surround. In my view, the central word element plays the greater role in the overall impression of the mark, owing to its size, while the background and border play a much lesser role.

Visual comparison

73. Both marks feature the word element 'APLA'. In both marks, the text elements are set against backgrounds and surrounded by a border of some sort. The points of visual difference are:

- The earlier mark comprises two word elements compared to the contested mark which has one word element;
- The presence of the element 'απλά' in the earlier mark, which is absent from the contested mark;

- The presence of the exclamation mark in the contested mark, which is absent from the earlier mark;
- The presence of the solid black background edged in white in the contested mark as compared to the mottled blue background with the white border which is, in turn, bordered by stylised foliage, in the earlier mark.

I find the parties' marks to have a medium level of visual similarity.

Aural comparison

74. As noted earlier at paragraph [18] of this decision, I consider the proportion of average consumers familiar with the Greek language to be small. The vast majority of UK average consumers will, to my mind, be unable to understand the Greek alphabet. I have therefore found the 'απλά' element of the earlier mark to be inarticulable for the average UK consumer. The earlier mark will, in my view, be articulated as 'AP-LA'. The contested mark will be articulated in the same way. I find the parties' marks to be aurally identical.

Conceptual comparison

75. I have found that the word element 'Apla' will be perceived by the average UK consumer as a made-up word to which no concept will attach. 'Apla' is the only articulable element of either mark. I find the marks to be conceptually neutral.

Comparison of goods

76. The goods to be compared are as follows:

Elbisco's earlier mark:	Kernagus' contested mark:
<p>Class 30:</p> <p><i>Bread; Hushpuppies [breads]; Unleavened bread; Unleavened bread in thin sheets; Bread flavoured with spices; Bread with sweet red bean; Unfermented bread; Matzo; Pitta bread; Bread casings filled with fruit; Tortilla shells; Malted bread mix; Danish bread; Danish bread rolls; Empanadas; Oat cakes for human consumption; Tea cakes; Barm cakes; Bagels; Thin breadsticks; Soft rolls [bread]; English muffins; Crispbread snacks; Semi-baked bread; Baguettes; Oat biscuits for human consumption; Bread biscuits; Biscuits [sweet or savoury]; Aperitif biscuits; Onion or cheese biscuits; Jam filled brioches; Nan bread; Taco shells; Multigrain bread; Pre-baked bread; Garlic bread; Scones; Currant bread; Pykelets; Crumpets; Croutons; Tortillas; Toasted bread; Breadcrumbs; Crisp breads; Sandwich wraps [bread]; Fresh bread; Fruited malt loaf; Rusks; Dutch rusk; Toasts [biscuits]; Thick breadsticks; Crumb; Bread rolls; Cornflour bread rolls (almojábana); Steamed bread; Buns; Bacon buns; Malt bread; Bread and buns; Filled bread rolls; Bread with</i></p>	<p>Class 29:</p> <p><i>Meat, fish, poultry and game; Meat extracts; Preserved, frozen, dried and cooked fruits and vegetables; Ready cooked meals made from meat, poultry, game, vegetables; Frozen meals consisting primarily of meat, poultry, game, vegetables; Jellies, jams, compotes; Eggs; Olive oil, extra virgin olive oil, sunflower oil; maize oil.</i></p> <p>Class 30:</p> <p><i>Coffee, tea, cocoa and artificial coffee; Rice, pasta and noodles; Tapioca and sago; Flour and preparations made from cereals; Bread, pastries and confectionery; Bread rolls, filled bread rolls; potstickers, dumplings; Rusks; Crispbread snacks; Wholewheat crisps; Breadsticks; Croutons; Biscuits; Savory biscuits; Pasta based prepared meals, rice based prepared meals; Chocolate; Ice cream, sorbets and other edible ices; Sugar, honey, treacle; Yeast, baking-powder; Salt, seasonings, spices, preserved herbs; Vinegar, sauces and other condiments; Ice [frozen water].</i></p>

soy bean; Fruit breads; Low-salt bread; Wholemeal bread; Pumpnickel; Flat bread; Soda bread; Gluten-free bread; Pastries, cakes, tarts and biscuits (cookies); Hardtack [biscuits]; Salted tarts; Chocolate covered pretzels; Savory pastries; Macaroons [pastry]; Danish butter cookies; Milk chocolate teacakes; Fried dough cookies; Wafers; Wafers [food]; Flan base wafers; Bean-jam filled wafers (monaka); Chocolate caramel wafers; Rolled wafers [biscuits]; Chocolate wafers; Almond pastries; Viennese pastries; Fruit filled pastry products; Orange based pastry; Pastries containing creams and fruit; Pastries containing fruit; Sweet biscuits for human consumption; Dutch gingerbread (taai taai); Chocolate pastries; Danish pastries; Prepared desserts [pastries]; Tarts [sweet or savoury]; Meringues; Strawberry gateaux; Flour confectionery; Edible wafers; Pastry shells for monaka; Pastry dough; Shortcrust pastry; Puff pastry; Pâtés en croûte; Vol-au-vent cases; Almond cake; Frozen yogurt cakes; Steamed sponge cakes (fagao); Malt cakes; Frozen pastries; Frozen pastry sheets; Frozen pastry stuffed with meat and vegetables; Frozen pastry stuffed with

vegetables; Breakfast cake; Treacle tarts; Plum-cakes; Quiches; Pumpkin pies; Shortbread part coated with chocolate; Shortbread part coated with a chocolate flavoured coating; Shortbread with a chocolate flavoured coating; Crème brûlées; Crepes; Meat pies; Meat pies [prepared]; Brittle; Pie shells; Doughnuts; Cookie mixes; Long-life pastry; Madeleines; Apple tarts; Muffins; Cupcakes; Fruit cake snacks; Biscuits for human consumption made from malt; Biscuits for human consumption made from cereals; Petit-beurre biscuits; Shortbread with a chocolate coating; Biscuits flavoured with fruit; Biscuits having a chocolate flavoured coating; Biscuits with an iced topping; Biscuits having a chocolate coating; Half covered chocolate biscuits; Biscuits containing fruit; Fortune cookies; Biscuits containing chocolate flavoured ingredients; Sponge fingers [cakes]; Chocolate biscuits; Gingerbread nuts; Chocolate covered wafer biscuits; Brownies; Brioches; Fresh pasties; Fresh sausage rolls; Fresh pies; Biscuits for cheese; Pies; Pies [sweet or savoury]; Vegetable pies; Egg pies; Pastries containing creams; Cream pies; Non-meat pies; Pies containing meat; Pies containing

vegetables; Fruit cakes; Egg roll cookies; Petits fours [cakes]; Savarins; Samosas; Pot pies; Flaky pastry containing ham; Vol-au-vents; Tarts; Egg tarts; Covered tarts; Custard tarts; Fried dough cookies (karintoh); Deep chocolate cake made with chocolate sponge; Chocolate cakes; Cream buns; Pastry shells; Gingerbread; Cereal bars and energy bars; Cereal cakes for human consumption; Snack foods made from corn and in the form of rings; Snack foods made of whole wheat; Cereal-based snack food; Rice-based snack food; Snacks manufactured from muesli; Granola-based snack bars; Snack bars containing a mixture of grains, nuts and dried fruit [confectionery]; Snack foods consisting principally of extruded cereals; Cereal based energy bars; Cereal preparations consisting of bran; Cereal preparations consisting of oatbran; Cereal preparations coated with sugar and honey; Cereal products in bar form; Cereal bars; High-protein cereal bars; Muesli bars; Cereal based food bars; Bars based on wheat; Sopapillas [fried pastries]; Salted wafer biscuits; Salt crackers; Salted biscuits; Savory biscuits; Boiled confectionery; Panned sweets (Non-medicated -); Crumble;

Sweetmeats; Prepared desserts [confectionery]; Bakery goods; Potato flour confectionery; Orange based confectionery; Confectionery having wine fillings; Dairy confectionery; Chocolate flavoured confectionery; Confectionery items coated with chocolate; Confectionery containing jelly; Nut confectionery; Confectionery having liquid spirit fillings; Confectionery having liquid fruit fillings; Confectionery containing jam; Chocolate confectionery having a praline flavour; Chocolate confectionery containing pralines; Chocolate-based spreads; Chocolate spreads containing nuts; Muesli desserts; Prepared desserts [chocolate based]; Sweetmeats [candy]; Flavoured sugar confectionery; Biscotti dough; Canapes; Waffles; Crackers; Crackers flavoured with fruit; Croissants; Turkish delight coated in chocolate; Chocolate coated nougat bars; Nougat; Non-medicated flour confectionery; Non-medicated flour confectionery containing imitation chocolate; Non-medicated flour confectionery coated with imitation chocolate; Non-medicated flour confectionery coated with chocolate; Non-medicated flour confectionery

containing chocolate; Non-medicated confectionery containing milk; Non-medicated confectionery having toffee fillings; Non-medicated confectionery having a milk flavour; Mint flavoured confectionery (Non-medicated -); Non-medicated confectionery containing chocolate; Non-medicated chocolate confectionery; Non-medicated chocolate; Snack foods consisting principally of confectionery; Graham crackers; Cheese-flavored biscuits; Confectionery chips for baking; Chocolate coated macadamia nuts; Coated nuts [confectionery]; Chocolate-coated nuts; Frozen yogurt pies; Cocoa based creams in the form of spreads; Custard; Bread pudding; Wafered pralines; Viennoiserie; Foods with a cocoa base; Chocolate based products; Cinnamon rolls; Pancakes; Fried dough twists; Foodstuffs containing cocoa [as the main constituent]; Foodstuffs containing chocolate [as the main constituent]; Jam buns; Peanut brittle; Chocolate coated fruits; Peanut confectionery; Halvah; Custards [baked desserts]; Rusks; Rusks; Snack food products made from rusk flour.

77. Elbisco has argued that the parties' goods are identical and similar, although it has not specified where the particular points of similarity lie.

Class 29

Contested goods: *Meat, fish, poultry and game*

78. I compare the contested goods to Elbisco's class 30 term *Frozen pastry stuffed with meat and vegetables*. The parties' goods will coincide in purpose only to the very broad extent that both are foods. Users and trade channels will overlap. The goods will often differ in terms of their methods of use; the contested goods will likely require further acts of preparation and/or cooking, whereas frozen stuffed pastries will merely need to be oven-cooked. The goods will differ in terms of physical nature; meat, fish, poultry and game are very different in appearance to frozen stuffed pastries. There may be a small degree of competition. A consumer deciding what to buy during their weekly shop for their evening meals might deliberate over whether to choose meat/fish/poultry/game or the ready-made frozen pastry. I find complementarity in some instances; meat may be an important ingredient for Elbisco's stuffed pastries, and the average consumer might expect the same undertaking to produce both meat and frozen pastries for which meat is an ingredient. All things considered, I find the respective goods to have only a very low level of similarity.

Contested goods: *Meat extracts; Eggs; Olive oil, extra virgin olive oil, sunflower oil; maize oil; Preserved, frozen, dried and cooked fruits*

79. Bearing in mind the purposes, users, trade channels, physical natures and methods of use of the parties' goods, and considering the matters of competition and complementarity, I do not find the contested goods to bear any level of similarity to any of Elbisco's goods. One would not expect the respective parties' goods to be sold in the same aisles in supermarkets. I find the parties' goods to be dissimilar.

Contested goods: *Preserved, frozen, dried and cooked vegetables*

80. I compare the contested goods to Elbisco's class 30 term *Frozen pastry stuffed with meat and vegetables*. The respective goods will share a purpose only to the very broad extent that both are food items typically consumed as part of a hot meal. Users and trade channels will coincide. The goods will have distinct physical natures; they will differ in their appearance. The contested goods in frozen form could be sold in close proximity to Elbisco's goods in the frozen food section. I find the parties' offerings to be complementary; vegetables will be a necessary ingredient for the frozen pastries and one might also expect the same undertaking to produce both goods. All things considered, I find the parties' goods to have a fairly low level of similarity.

Contested goods: *Ready cooked meals made from meat, poultry, game, vegetables*

81. I compare the contested goods to Elbisco's class 30 term *Frozen pastry stuffed with meat and vegetables*. The goods will overlap in purpose; both are intended as 'convenience' foods or meals. Users and trade channels will also be shared. The goods will overlap in terms of methods of use to the extent that 'ready cooked meals' are often sold frozen to be reheated for consumption. I consider the goods to be somewhat similar in terms of physical nature; both may be frozen and packaged in 'ready meal' trays and/or cardboard sleeves. I find the parties' offerings to be competitive in some instances; one might deliberate over whether to purchase a frozen 'ready meal' or a frozen stuffed pastry for a quick easy meal. I do not find complementarity between the parties' offerings; neither good being necessary or important for the other. I find the parties' goods to have at least a medium level of similarity.

Contested goods: *Frozen meals consisting primarily of meat, poultry, game, vegetables*

82. I compare the contested goods to Elbisco's class 30 term *Frozen pastry stuffed with meat and vegetables*. For the same reasons as above at [81], I find the parties' goods to have at least a medium level of similarity.

Contested goods: *compotes*

83. I compare the contested goods to Elbisco's class 30 term *Prepared desserts [confectionery]*. Compotes are typically used as ingredients in desserts, e.g trifle, or accompaniments to desserts such as ice cream. The parties' goods will differ in terms of their specific purposes; the contested goods intended as ingredients as opposed to prepared desserts which are complete ready-to-consume food items. Users and trade channels will overlap. Methods of use will differ. The respective goods will often differ in terms of their physical natures; 'compotes' are typically purees with a 'jam-like' consistency whereas desserts tend to be in the form of, *inter alia*, cakes, puddings or mousses. I find the respective goods to be neither competitive nor complementary; neither is substitutable for the other, and the average consumer would unlikely presume both to originate from the same undertaking. I find the goods to be dissimilar. If I am wrong about that, then the goods will have a very low level of similarity.

Contested goods: *jams*

84. *Jams* are spreadable food items typically eaten with bread/toast or other bakery items. I compare these goods to Elbisco's class 30 term *Chocolate-based spreads*. The goods will overlap in purpose, both being foodstuffs typically consumed with bakery items. Users and trade channels will overlap. The goods will be sold in reasonably close proximity to one another on supermarket shelves. Physical natures will coincide to the extent that both are spreadable. Methods of use will overlap. The respective goods are somewhat competitive, each being substitutable for the other. I do not find complementarity, neither good being necessary or important for each other. I find the parties' goods to have a medium to high level of similarity.

Contested goods: *Jellies*

85. I compare these goods to Elbisco's class 30 term *Prepared desserts [confectionery]*. I note that the parties' goods are in different classes. However,

the fact that goods/services are in different classes does not, in itself, mean that they cannot be identical. I note that class 29 of the Nice classification covers 'mainly foodstuffs of animal origin, as well as vegetable and other horticultural comestible products which are prepared or preserved for human consumption'. I note that class 30 covers 'mainly foodstuffs of plant origin, except fruits and vegetables, prepared or preserved for consumption, as well as auxiliaries intended for the improvement of the flavour of food'. It is my view that the term 'prepared desserts' is very broad and will ordinarily be understood as encompassing any 'ready-to-eat' food item that is consumed as a dessert. To my mind 'jellies' will ordinarily be understood as the 'ready-to-eat' gelatinous fruit-flavoured dessert. I find that 'jellies' are prepared desserts and that they will be encompassed by Elbisco's term *Prepared desserts [confectionery]*. I find the parties' goods to be identical according to the principle in 'Meric'.

Class 30

86. I set out in the following table the goods which are identical; either self-evidently, synonymously or according to the principle in 'Meric':

Elbisco's earlier mark:	Kerangus' contested mark:
<i>Bread</i>	<i>Bread</i>
<i>Pastries</i>	<i>Pastries</i>
<i>Bread rolls</i>	<i>Bread rolls</i>
<i>Filled bread rolls</i>	<i>filled bread rolls</i>
<i>Flour confectionery</i>	<i>Confectionery</i>
<i>Rusks</i>	<i>Rusks</i>

<i>Crispbread snacks</i>	<i>Crispbread snacks</i>
<i>Snack foods made of whole wheat</i>	<i>Wholewheat crisps</i>
<i>Thick breadsticks</i>	<i>Breadsticks</i>
<i>Croutons</i>	<i>Croutons</i>
<i>Biscuits [sweet or savoury]</i>	<i>Biscuits;</i> <i>Savory biscuits</i>
<i>Non-medicated chocolate</i>	<i>Chocolate</i>
<i>Prepared desserts [confectionery]</i>	<i>Ice cream, sorbets and other edible</i> <i>ices</i>
<i>Cereal preparations consisting of bran</i>	<i>preparations made from cereals</i>

Contested goods: *Rice, pasta and noodles; Tapioca and sago; Flour; Yeast, baking-powder; Salt, seasonings, spices, preserved herbs; Vinegar, sauces and other condiments; Ice [frozen water]; Sugar, honey, treacle*

87. It is appreciated that the goods enumerated above are likely to be ingredients in many of Elbisco's goods. However, I bear in mind that the General Court in the case of *Les Éditions Albert René v OHIM*²⁰ held that:

"61... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature,

²⁰ Case T-336/03

intended purpose and the customers for those goods may be completely different.”

88. Bearing in mind the purposes, users, trade channels, physical natures and methods of use of the parties’ goods, and considering the matters of competition and complementarity, I do not find the contested goods to bear any level of similarity to any of Elbisco’s goods. I find the parties’ goods and services to be dissimilar.

Contested goods: *Coffee, tea, cocoa and artificial coffee*

89. The contested goods are all beverages. Bearing in mind the purposes, users, trade channels, physical natures and methods of use of the parties’ goods, and considering the matters of competition and complementarity, I do not find the contested goods to bear any level of similarity to any of Elbisco’s goods. I find the parties’ goods and services to be dissimilar.

Contested goods: *potstickers*,²¹ *dumblings* [sic]²²

90. The contested goods are types of dumplings. I understand that dumplings are savoury balls of dough which are typically added to stews or casseroles in the final stage of cooking. I compare these goods to Elbisco’s class 30 term *Fried dough twists*. The respective goods will overlap in purpose only to the very broad extent that both parties’ offerings are foods. Their specific purposes will differ; the contested goods are typically intended as an addition to stews or casseroles, whereas ‘fried dough twists’ are, to my mind, likely consumed on their own as snacks. Users and trade channels will overlap. I consider it unlikely that the parties’ goods would be found in close proximity to each other in physical shops; ‘fried dough twists’ will, in my view, more likely be found in a ‘bakery goods’ section among other ‘ready-to-eat’ items. I consider that dumplings or ‘potstickers’ would most likely be found as balls of uncooked dough to be added

²¹ I understand that these are a type of dumpling.

²² I presume that there is a typographical error in the term as recorded on the register and that it should read ‘dumplings’.

to stews/casseroles by the consumer after purchase. The parties' goods will be different in terms of their physical natures to the extent that 'fried dough twists' will be ready-cooked and a different shape to uncooked dumplings or potstickers. Methods of use will also differ; one good will be added to a stew/casserole whereas the other will be readily consumed as a snack. The goods are not in a competitive relationship, neither good being substitutable for the other. I do not find complementarity, either; neither good being necessary or important for the other. I find the parties' goods and services to have a fairly low level of similarity.

91. Some similarity between the parties' goods and services is necessary in order for an opposition under section 5(2)(b) of the Act to succeed. I will therefore give no further consideration to the goods and services that I have found to be dissimilar, since the opposition must necessarily fail to that extent.

Average consumer and the purchasing act

92. My comments above at [59] – [60] in relation to the cancellation proceedings also apply here.

Distinctive character of the earlier mark

93. The text element 'απλά' is incapable of articulation by the average UK consumer. The distinctive element for the average consumer will be 'apla', which will be perceived as a made-up word. The mark neither describes nor alludes to the goods in respect of which it is registered. I find that the mark will have a high level of distinctive character for the average UK consumer.

Likelihood of confusion

94. In my view, despite the points of identity and similarity that I have identified between the parties' goods, the effect of the visual differences between the marks is sufficient to prevent the average consumer from mistaking one party's mark for the other. I find this to be the case, even though I have found the marks to be aurally identical. The aural identity arises by virtue of the fact that the text

element 'απλά' is incapable of articulation by the average consumer leaving the only articulable element 'apla'. However, I consider that the presence of the element 'απλά' will nevertheless be registered visually, owing to its positioning and larger size relative to the element 'apla', even though it will not be understood by the vast majority of average UK consumers. I find that there is no likelihood of direct confusion.

95. I now consider whether there is a likelihood of indirect confusion. In *L.A. Sugar Limited v Back Beat Inc*²³ Mr Iain Purvis Q. C. (as he then was), as the Appointed Person, explained that [my words in parentheses]:

17. Instances where one may expect the average consumer to reach such a conclusion [i.e. to conclude that marks relate to the same or economically linked undertakings] 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)".

96. My view is that the instant case falls within the first category outlined above.

Although it might be said that the 'apla' element of the earlier mark is not dominant in the mark, owing to its much smaller size relative to 'απλά', it is the

²³ Case BL O/375/10

distinctive element. The marks are aurally identical. The 'apla' element common to the parties' marks will have a high level of inherent distinctive character because it will be perceived by the average UK consumer as a made-up word. I consider that a significant proportion of average consumers might presume the marks to be variant marks relating to the same undertaking. For example, it might be presumed that the 'απλά' is simply a rendering of the brand name 'apla' in non-English characters. If the average consumer recognises that the marks are different by virtue of the Greek letters, they are, in my view, likely to assume that the mark says the same thing in another language. I find that there is a likelihood of indirect confusion between the parties' marks. I find this to be the case for all contested goods that I have found to have a level of similarity of 'fairly low' and above. I do not consider there to be a likelihood of confusion in respect of contested goods that I have found to have a 'very low' level of similarity to Elbisco's goods.

97. The Opposition has been partially successful. Subject to a success appeal, the application is:

- Refused in respect of the following goods only:

Class 29:

Preserved, frozen, dried and cooked vegetables; Ready cooked meals made from meat, poultry, game, vegetables; Frozen meals consisting primarily of meat, poultry, game, vegetables; jams; Jellies.

Class 30:

Bread; Pastries; Bread rolls; filled bread rolls; Confectionery; Rusks; Crispbread snacks; Wholewheat crisps; Breadsticks; Croutons; Biscuits; Savory biscuits; Chocolate; Ice cream, sorbets and other edible ices; preparations made from cereals; potstickers, dumplings [sic].

- Allowed to proceed in respect of the following goods only:

Class 29:

Meat, fish, poultry and game; Meat extracts; Eggs; Olive oil, extra virgin olive oil, sunflower oil; maize oil; Preserved, frozen, dried and cooked fruits; compotes.

Class 30:

Rice, pasta and noodles; Tapioca and sago; Flour; Yeast, baking-powder; Salt, seasonings, spices, preserved herbs; Vinegar, sauces and other condiments; Ice [frozen water]; Sugar, honey, treacle; Coffee, tea, cocoa and artificial coffee.

COSTS

98. Elbisco was the successful party in the Cancellation proceedings and is entitled to a contribution towards its costs. Both parties have enjoyed a measure of success in the Opposition proceedings. Costs will therefore be awarded in respect of the Cancellation action only. Costs are based upon the scale published in Tribunal Practice Notice 2/2016, and are calculated as follows:

Consideration of the application for invalidation and preparation of Defence and Counterstatement	£200
Preparation of written submissions	£300
Total:	£500

99. I therefore order Kerangus Holdings LTD to pay to Elbisco Industrial and Commercial Foods S.A. the sum of £500. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 30th day of October 2023

N. R. Morris

**For the Registrar,
the Comptroller-General**