

**O-644-18**

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NO 3 085 345: MANJARO  
SAUCE IN CLASS 30 IN THE NAME OF APOLLO APOLLINAIRE OUEDRAOGO

AND

IN THE MATTER OF AN APPLICATION FOR INVALIDATION UNDER NO 501766  
BY RAFIQ ALI

## Background and pleadings

1. Apollo Apollinaire Ouedraogo (AAO) is the owner of UK trade mark No 3 085 345: Manjaro Sauce. It was applied for on 10<sup>th</sup> December 2014 and registered in the UK on 5<sup>th</sup> June 2015 in respect of the following goods in Class 30:

*Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes.*

2. Rafiq Ali (RA) has applied for invalidation of the aforementioned trade mark on the basis of Section 3(6) of the Trade Marks Act 1994 (the Act). He argues that this is on the basis of its allegation that AAO was aware when making the application that RA was using the trade mark MANJARO SAUCE and thus attempted to pre-empt RA from using and/or registering his mark in the UK. Further, RA argues that AAO has filed the application without any intention to use the trade mark.
3. AAO filed a counterstatement denying the claims made. He argues that it is RA who is in fact acting in bad faith. This is on the basis of AAO's earlier rights in KILIMANJARO, from which, AAO alleges, MANJARO has been extracted by RA.
4. Both sides filed evidence. This will be summarised to the extent that it is considered necessary. Both sides filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.

## **Evidence filed**

5. It should be noted that these proceedings were, at one stage, also consolidated with two sets of opposition proceedings. These oppositions were brought by AAO in respect of RA's trade mark applications for MANJARO EXPRESS and MANJARO PARMO on the basis of earlier rights held by him in respect of KILIMANJARO<sup>1</sup>. The evidence filed therefore covered all of the consolidated proceedings. Subsequent to this, the opposition proceedings were withdrawn and only the invalidation application by RA remains. All of the evidence filed in the consolidated proceedings is reflected in the summary that follows, where it is appropriate to do so and where it relates to the issue in hand here, namely whether AAO applied for this trade mark application, the subject of these proceedings, in bad faith. The ordering of the summary is in chronological order.

### **AAO's Evidence (1)**

6. This is a witness statement, dated 22<sup>nd</sup> September 2017, from AAO. It was initially filed in respect of the aforementioned opposition proceedings (now withdrawn). The summary that follows is focussed upon the information provided that is considered to be directly relevant (or provide important context) to the issue of bad faith, the subject of these proceedings. AAO explains that he does not have access to full documentary evidence to support his account, for reasons which will become clear. AAO lists the registered trade marks he claims to own. It is noted that these are a variety of marks including (or composed entirely of) KILIMANDJARO and/or KILIMANJARO. The business field covered by these registrations is, generally speaking, in respect of foodstuffs and services in respect of the provision of food (restaurants etc).

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<sup>1</sup> Also on occasion referred to as "KILIMANDJARO". This appears to be used interchangeably and so nothing is considered to turn on this point.

7. The chronological history of AAO's businesses is somewhat complex. However, it seems as though it can be summarised as follows:

2007 – AAO opens a restaurant under the name KILIMANDJARO in Middlesborough. It trades for around a year and closes.

2009 – AAO opens a second restaurant called KILIMANDJARO in Middlesborough. Again, this trades for around a year before closing.

2011 – AAO opens a third restaurant called KILIMANDJARO. The address of this restaurant is 186 Linthorpe Rd, Middlesborough. It is noted that this is the address that RA's MANJAROS restaurant is currently trading from. AAO's third restaurant closed in December 2012.

2015 – AAO opens a fourth restaurant at 243 Lindthorp Road (and so in close proximity to the previous address) under the name KILIMANDJARO.

8. According to AAO, he was forced to leave the premises at 186 Linthorpe Road in December 2012, after which the restaurant was taken over by Kilimanjaro Limited, the Director of which was Mr Tariq Bilal Younis. Mr Younis, according to AAO, attempted to obtain a trade mark in AAO's name, by claiming that AAO had assigned the mark to him. Exhibit AAO3 is a copy of a decision of the UK Trade Marks Registry in respect of rectification proceedings. The outcome of these proceedings was that Mr Younis was found to have forged AAO's signature in the assignment documents filed with the Registry. The potential relevance of this in respect of these proceedings, is that during the rectification proceedings, RA filed a witness statement in support of the position of Mr Younis (that AAO agreed to assign the mark to Mr Younis during a meeting in which RA was present and that payment for this mark was made to AAO).
9. When AAO was removed from the restaurant at 186 Linthorpe Road, it continued trading as KILIMANJAROS. . This is supported by Exhibit AAO14,

which are copies of pages from Twitter, dated from February 2013. This information displays the address of the restaurant (186 Linthorpe Road) and early tweets declare that “kilimanjaro is back on Monday”. The name of the restaurant was subsequently changed to MANJAROS. According to AAO, this change of name occurred sometime after the rectification proceedings were initiated and before the decision was reached.

10. AAO claims that it is as a result of being evicted from the premises at 186 Linthorpe Road that he is unable to provide details of sales from a restaurant business under KILIMANDJARO. That said, I cannot see that there is any difference of opinion between the parties on this and so am prepared to accept that AAO has at various points prior to the filing date and at various premises, provided restaurant services under this name.

11. AAO provides details of the trade mark registrations owned by RA. It is noted that these include one for MANJAROS in respect of restaurant services, filed on 30<sup>th</sup> March 2013. There is also one for CHILLIMANJAROS in respect of restaurant services and the like, filed on 21<sup>st</sup> March 2013. AAO is of the view that these registrations supports his position. This is because it is proof (in his view) that RA was attempting to register trade marks similar to those owned by AAO (and so to benefit from goodwill created by the businesses of AAO) and has been doing so for some time. According to AAO, it is noteworthy that these trade marks were filed a short time after he had been evicted from the premises of 186 Linthorpe Road in December 2012.

12. As further support for his position, AAO exhibits at AAO8, menu covers from his and RA's restaurants respectively. In his view there are a number of similarities between them, such as an oval device in the centre of the menu, a similar looking cockrel device and very similar background scenery. Exhibit AAO11 is a copy of an email sent to customers of AAO, dated 2012. It is noted that the email is signed off with “remember: tasting is believing”. This, according to AAO appears on both his menu's and those of RA's restaurant, the implication being that it was copied.

13. AAO also alleges that RA has applied for another trade mark “KILIMANDJARO WAKA WAKA CHICKEN” (later withdrawn) in 2013 and that this is copied from a dish that appeared on AAO’s menu. Exhibit AAO12 is a copy of one of AAO’s menus. The dish described appears within.

## **RA’s Evidence (1)**

14. This is a witness statement, dated 22<sup>nd</sup> November 2017, from RA. RA explains that prior to his involvement in the restaurant business, he previously managed a bar on Linthorpe Road, Middlesborough which is where he first met Mr Younis. He would also meet Mr Younis in his restaurant across the road named KILIMANJARO. According to RA, Mr Younis told him he was a partner in this restaurant. Further, it was here RA got to know AAO, who he was told was running the business with Mr Younis. During November 2012, discussions between RA and Mr Younis, culminated in RA agreeing to work for Mr Younis in mid-December 2012. RA ran the KILIMANJARO restaurant for Mr Younis for around a year and a half. In January 2014, Mr Younis offered RA the opportunity to take over his business for the sum of £20,000 including fixtures and fittings and the lease of the property. According to RA, he took ownership of the business in April 2014, but prior to this (February/March 2014) he had decided to rebrand the restaurant as MANJAROS so as to distance it from the previous KILIMANJAROS (in the light of its reputation for food hygiene offences and its numerous attempts at failed businesses). In February/March 2014, RA explains that he worked with a design house to create banners and other marketing material (Exhibit RA4 includes examples of such material) and in April 2014, he took a 5 year lease from Mr Younis. The rebranded restaurant then opened (around March/April 2014). RA claims that the restaurant has been very successful and has generated a lot of interest and press coverage. Exhibit RA3 contains examples of press coverage showing that the restaurant has been trading and demonstrates it has also been visited by famous stars such David Haye, Dappy, Tinie Tempah and Tinchy Stryder. It is noted that the earliest example of press coverage is dated 6<sup>th</sup> March 2014. A restaurant called Manjaros is

clearly visible and shows a celebrity guest arriving, eating and leaving. This appears to corroborate RA's account.

15. RA also explains that he has used MANJAROS in relation to sauces since the restaurant opened in March 2014 on his menus and on bottles of sauce which are provided free of charge to users of the restaurant. Exhibit RA1 is a copy of the menu of the restaurant Manjaros. Listed therein is a dish with is accompanied with Manjaros sauce. Exhibit RA22 shows a selection of sauce bottles with Manjaros affixed to them. These are undated.

16. There is a witness statement, dated 22<sup>nd</sup> November 2017, from Mr Tariq Bilal Younis. Mr Younis presents a different perspective of events from that provided by AAO, the pertinent details of which are as follows:

- Mr Younis claims that he met AAO around 15 years prior when AAO was a labourer working for Mr Younis's father. They became friends and remained so for some years afterwards.
- Mr Younis explains that AAO opened various restaurants called KILIMANJAROS over the years, each of which failed because, according to Mr Younis, AAO did not have the funds to keep them going nor the business acumen needed. Mr Younis states that the first restaurant opened by AAO ran into trouble and in mid 2011, he agreed with AAO to provide £10,000 as investment in return for becoming a 50/50 partner in the business. In November 2011, along with AAO, they took over a premises (and the respective lease along with all fixtures and fittings) in Lindthorpe Road (from a Mr Urfan Suleman) and Mr Younis paid £25,000 to do so. Due to AAO having no available funds, Mr Younis then paid an additional £25,000 to set up a menu, floor plan, promotions, to pay staff and to make changes to the restaurant. Other payments were also made by Mr Younis in respect of rent and arrears.
- Mr Younis explains that he received no returns on his investment and as a result, he began to look at the business more closely. Upon doing so, he discovered that AAO had incorporated more than one company (in respect of

the running of the restaurant) without telling him. Following this, he informed AAO that he needed to leave the business. Mr Younis adds to this that he also suspected AAO to be stealing from him. He then heard that AAO planned (once the lease was in his name) to force Mr Younis out of the business.

- On 5<sup>th</sup> December 2012, Mr Younis explains that he went to the restaurant to confront AAO and informed him that the lease was in his name and that AAO needed to leave the premises. Mr Younis claims that AAO became aggressive and that following this, the police were called. On their arrival, Mr Younis informed them that he was the owner (with relevant documentation to prove it). The police evacuated the building leaving only Mr Younis inside. AAO was escorted by the police to collect his belongings and then left. RA was also present that night, but only arrived around the time the police turned up.
- Mr Younis corroborates RA's account of how they met (at a bar ran by RA) and also confirms that RA came to work for him in December 2012, making him manager of the new restaurant.
- Regarding the earlier rectification proceedings, Mr Younis maintains (despite the outcome), that the signature did belong to AAO and that he did not appeal the decision due to time and cost. In April 2014, he sold the business to RA. This included all fixtures and fittings. It also included the menus (thus providing an explanation for any similarity as alleged by AAO) and telephone numbers.

17. A further witness statement, dated 22<sup>nd</sup> November 2011, is from Mr Urfan Suleman. Mr Suleman is the person referred to in the statement of Mr Younis (above). Mr Suleman confirms that initially, he worked with AAO in respect of transferring the lease as he was told that it was AAO who would be running the restaurant. However, upon learning (from Mr Younis) that AAO was planning on forcing Mr Younis out of the business, he instead transferred the lease to him. He explains he had no issue with this as it was, in any event, Mr Younis who was paying him.

## **AAO's Evidence (2)**

18. This is a witness statement, dated 8<sup>th</sup> January 2018, from AAO. This was filed in support of his position in these (invalidation) proceedings. Some of the content therein repeats that already filed and described above. The following is further information, which is considered relevant:

- In October 2015, AAO opened a fourth restaurant at 243 Linthorpe Road called KILIMANDJARO;
- AAO denies that he knew that RA was using MANJARO SAUCE;
- AAO claims that any use by RA is a misrepresentation of AAO's use of KILIMANDJARO and the goodwill created since 2007. In fact, that it is RA who has acted in bad faith;
- AAO explains that he uses KILIMANJARO SAUCE on a range of sauces which is available in some stores in Middlesbrough (he does not say when this use started) and that he has an intention to possibly in the future introduce a MANJAROS SAUCE. This is because of its similarity and links with his KILIMANJARO brand. Further, AAO claims that MANJAROS is a derivative of his earlier brand and so his application cannot be in bad faith.
- AAO reiterates his claim that RA's trade mark applications and registrations are enlightening as they are all derivatives of AAO's earlier brand. RA's other registered trade marks include CHILIMANJAROS (filed 21<sup>st</sup> March 2013) and MANJAROS (filed 30<sup>th</sup> March 2013).

## **RA's Evidence (2)**

19. This is a witness statement, dated 5 February 2018, from RA.

20. RA accepts that AAO has used the trade mark KILIMANJARO SAUCE in respect of foodstuffs and that such use began at least in 2012 and continues to the present date. RA alleges that no use has been made by AAO of MANJARO and/or MANJARO SAUCE.

21. RA reiterates that he opened a restaurant under the MANJAROS mark in March 2014. He notes that AAO confirms that he was aware that a restaurant under this name had opened during the rectification proceedings described by AAO in his evidence. As such, RA argues that AAO knew about MANJAROS being used by RA around 6 months prior to AAO's application for the term.
22. RA ends his witness statement by stating that although AAO makes numerous references to MANJAROS being a component part or a derivative of the word KILIMANJAROS, he doesn't explain its relevance to these proceedings.

## **Conclusions on the Evidence**

23. There are clear differences in the perspectives of the parties as regards the history between them and the chain of events which culminated in AAO's application for MANJAROS SAUCE, the subject of these proceedings. It is considered that the following is of relevance and emerges from the evidence filed:
- AAO and Mr Younis were in a business partnership which turned sour;
  - Mr Younis is an associate of RA. RA went on to run a business from the same premises and indeed was initially the same restaurant and business as that when AAO was in partnership with Mr Younis;
  - RA changed the name of the restaurant to MANJAROS in March 2014;
  - AAO states that the name of the restaurant changed prior to the issue of the rectification proceedings decision (this was issued in June 2014). Though this could be taken to mean that AAO was aware of the change of name around the time that the change took place, he later denies this.
  - RA was using MANJAROS as the name of his restaurant prior to the filing date in these proceedings. The earliest date according to the (limited) evidence is 6<sup>th</sup> March 2014. As part of the running of his restaurant, he also used Manjaros on sauces. This evidence is undated, but has not been

contested by AAO. RA also owns a registered trade mark MANJAROS for restaurant services and the like in Class 43. This was filed in March 2013.

- AAO is of the view that RA is guilty of copying his business model: he is explicit in this throughout his evidence, pointing to similarities between the name KILIMANJAROS and MANJAROS and even the style of menus and straplines used (the latter being “remember: tasting is believing”). Mr Younis provides an explanation for the latter (that they were all included in the sale between himself and RA).
- AAO is using the name KILIMANJAROS on sauces and the like. This is accepted by RA. There is no evidence that he is (or has been) using MANJAROS on the same goods. AAO explicitly states that it is “possible” that he will do in the future.

## Final Remarks

24. It is unclear from the accounts of Mr Younis and Mr Suleman as to when the lease for 186 Linthorpe Road was transferred. However, as this is part of the historical context, nothing is considered to turn on this point.

## Legislation

25. Section 3(6) of the Act states:

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

26. The law in relation to section 3(6) of the Act (“bad faith”) was summarised by Arnold J. in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch), as follows:

“130. A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/Article 3(2)(d) of the Directive/Article 52(1)(b) of

the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, "Bad faith in European trade mark law" [2011] IPQ 229.)

131. First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see Case C- 529/07 *Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132. Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2008] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and Case C-192/03 *Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133. Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207-2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134. Fourthly, bad faith includes not only dishonesty, but also "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined": see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

135. Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

136. Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137. Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138. Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

"41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the

relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48)."

27. I also take into account the guidance in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHR 1929 (Ch), where Arnold J. held that a possible or contingent intention to use the mark in relation to the goods/services covered by the application would normally be sufficient to prevent a finding of bad faith on the grounds of no intention to use the mark. He stated:

"161. If the UK's requirement for a declaration of intention to use is compatible with the Directive, and the making by the applicant of a false declaration of intent to use can amount to bad faith, the next issue concerns the intention which the applicant must have in order to be able to declare in good faith that he intends to use the mark in relation to the goods or services specified in the application in the UK. Counsel for the Defendants submitted that a concrete

present intention was required, whereas counsel for Red Bull submitted that a possible or contingent future intention was sufficient.

162. In *Knoll* Neuberger J. said that "whether a contemplated use, or a possible or conditional intention to use, can suffice must depend upon the circumstances". In that case, he found that the proprietor had had a definite intention to use the mark in relation to pharmaceutical preparations for the treatment of obesity and contemplated that it might use the mark in relation to other pharmaceutical products. In those circumstances he held that it was unarguable that the proprietor had acted in bad faith by making a false declaration that it intended to use the mark in relation to pharmaceutical preparations and dietetic substances. In *32Red* the Court of Appeal appears to have accepted that a possible future use of the mark in relation to the services applied for was enough to defeat an allegation of bad faith on the ground of lack of intention to use in the circumstances of that case, albeit without any detailed consideration of the law.

163. Neuberger J's statement in *Knoll* appears to me to be not only correct in principle, but also supported by the subsequent jurisprudence of the CJEU in *Lindt v Hauswirth* and *Internetportal v Schlicht*. I therefore conclude that a possible or contingent intention to use the mark at some future date may suffice. Whether it does suffice will depend on all the circumstances of the case, and in particular whether there are other factors present of the kind mentioned in paragraph 139 above". [i.e. whether the application is an attempt to gain protection for an unregistrable mark or to block others from using the mark].

28. Thus, AAO does not necessarily need to demonstrate a concrete plan to use MANJAROS SAUCE in order to avoid a finding of bad faith on the basis of no intention to use. Indeed he explicitly says in his evidence that it is "possible" that he will use the trade mark on sauces in the future. It is noted that the trade mark under attack was registered in June 2015 (over three years ago) and to date there has been no use, nor has there been any information to suggest planned use. That said, this is not, in itself, fatal to RA's case. Irrespective, this is not the end of the matter, as the Court was also clear that

whether or not there is bad faith depends on all the circumstances of the case.

29. In this regard, I also take into account the finding in *Copernicus-Trademarks v EUIPO (LUCERO)* Case T-82/14, where the General Court found that the filing of EU trade marks for the purposes of blocking applications by third parties, and without an intention to use the mark, was an act of bad faith.

30. It is considered that the history between the parties is highly relevant and important in these proceedings. It is noted that the rectification proceedings, which involved claims of fraud and which raised doubts as to the truthfulness of RA's evidence (in those proceedings), was decided in AAO's favour. It would appear that AAO felt aggrieved, both at being removed from the KILIMANJAROS restaurant business and the events that then followed. It is also clear that AAO considers that RA has copied numerous aspects of his restaurant business, including using a name for his restaurant which AAO considers to be too similar to his own.

31. In considering what the applicant knew at the time of filing the application, it is in dispute as to whether or not AAO was aware of the change of name of the restaurant to MANJAROS prior to filing the application. His evidence on the point is arguably contradictory. In one witness statement (filed during the now withdrawn opposition proceedings where AAO was the opponent), he states that the name changed sometime during the rectification proceedings in Spring/Summer 2014. In the witness statement in support of his position in the invalidation proceedings (filed later and in response to the evidence of RA where RA states that AAO knew the restaurant name had changed), he flatly denies being aware that the restaurant name had changed prior to filing the trade mark application. Bearing in mind the history between the parties, it is considered that, on the balance of probabilities, it is highly unlikely that AAO was unaware that the restaurant name had changed to MANJAROS prior to his filing the application.

32. Added to this, the motivation (and intention) of AAO in filing this application is crucial and it is considered that the events which lead up to the filing date of the aforementioned application are highly relevant. AAO has indicated that he considers MANJAROS as rightfully his as it is a derivative of KILIMANJAROS. Further, that it is RA who has copied him. I take this to mean that AAO considers he is morally right. However, I am reminded that when considering bad faith and deciding whether or not behaviour is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) is to be judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry.
33. Bearing in mind the guidance quoted at paragraph 26 above, deciding upon the intentions of AAO at the time of the filing of the application is a subjective factor, bearing in mind the objective circumstances of the case. There is history between the respective parties and/or their associates. There are previous rectification proceedings, which included a finding of forgery. AAO also makes references to other trade marks owned by RA which AAO feels show a pattern of "copying" behaviour. AAO indicates that he feels aggrieved at what he perceives to be his unfair treatment at the hands of RA and Mr Younis. It is considered that it is highly unlikely that AAO filed MANJAROS as a logical derivative of his own earlier KILIMANJAROS and with an intention to use it. Rather, it is, bearing in mind all of the circumstances of the case, considered that it was motivated by his desire to disrupt the activities of RA. The invalidation proceedings therefore succeed.

## **COSTS**

34. The applicant for invalidation has been successful and is entitled to a contribution towards its costs. In the circumstances I award RA the sum of £1000 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Application for invalidation and statement of grounds plus official fee - £500

Preparation of evidence - £500

TOTAL - £1000

35. I therefore order Apollo Apollinaire Ouedraogo to pay Rafiq Ali the sum of £1000. The above sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 12<sup>th</sup> day of October 2018**

**Louise White**

**For the Registrar,**

**The Comptroller-General**