

**O-1088-24**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK REGISTRATION NOS. 915823991 AND  
3185199**

**IN THE NAME OF BIMS AFRICAN FOOD STORE LIMITED IN RESPECT OF THE  
SAME TRADE MARK**



**IN CLASSES 29, 30 AND 33**

**AND IN THE MATTER OF CONSOLIDATED INVALIDATION AND REVOCATION  
PROCEEDINGS THERETO UNDER NOS. 504843, 504844, 505290 AND 505291  
BY BIMS WALTHAMSTOW LIMITED**

## BACKGROUND AND PLEADINGS

1. This decision is in respect of consolidated applications for invalidation and revocation by Bims Walthamstow Limited (“Party A”) of two trade marks registered in the name BIMS African Food Store Limited (“Party B”).

2. The relevant details of these two marks are shown below:

Trade marks 915823991 and 3185199 (with identical representations and lists of goods)



Colour Claimed r.e. the 915823991 mark only: Dark Blue; Light Blue.

**Class 29:** *Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; preserved or dried seeds; preserved or dried nuts; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats; pulses, beans and lentils; soya beans; black eye beans.*

**Class 30:** *Coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; cassava flour, yam flour, semolina flour; bean flour; plantain flour; garri; garri cassava; bread, pastries and confectionery; edible ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces [condiments]; spices; ice.*

**Class 33:** *Alcoholic beverages [except beers]; palm wine.*

2. The respective relevant dates are as follows:

<b>Mark No</b>	<b>Filing Date</b>	<b>Registration Date</b>
915823991	12/09/2016	10/02/2017
3185199	12/09/2016	13/01/2017

3. The 915823991 registration is a comparable mark filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union.

4. In respect of the two applications for revocation, Party A seek revocation of both of Party B's registrations on the grounds of non-use based upon Section 46(1)(a) and (b) of the Trade Marks Act 1994 ("the Act"). Party B filed a counterstatement denying the claim and asserting it has used its marks in respect of the following list of goods:

(1) Class 30: Rice; tapioca and sago; flour and preparations made from cereals; cassava flour, yam flour, semolina flour; bean flour; plantain flour; garri; garri cassava; Honey, Spices

(2) Class 29: Fish, meat; preserved, frozen, dried and cooked fruits and vegetables; preserved or dried seeds and nuts; edible oils and fats; pulses, beans and lentils; soya beans; black eye beans.

(3) Class 33: Palm wine.

5. Revocations are sought under Section 46(1)(a) in respect of the 5-year periods following the dates of completion of the registration procedures of Party B's marks. The revocations are also sought under section 46(1)(b). Therefore, the dates relevant to these claims are detailed in the table below:

Trade Mark	Section 46(1)(a) period	Section 46(1) (a) Revocation Date	Section 46(1)(b) periods	Section 46(1) (b) Revocation Date
<b>3185199</b>	14 January 2017 to 13 January 2022	14 January 2022	29 April 2017 to 28 April 2022 and 14 January 2017 and 13 January 2022	29 April 2022 and 14 January 2022
<b>915823991</b>	11 February 2017 to 10 February 2022	11 February 2022	29 April 2017 to April 2022 and 11 February 2017 to 10 February 2022	30 April 2022 and 11 February 2022

6. In respect of the two applications for invalidation, Party A relies upon section 47(2)(b) and section 5(4)(a) of the Act and claims goodwill in respect of the sign BIMS KITCHEN, that was first used in the UK in 2010, in respect of *condiments; sauces; retail services relating to condiments and sauces*. It states that this goodwill was acquired on 17 February 2022. It asserts that the parties operate in “highly similar fields of business” and that the average consumer would clearly be deceived, by the use of the disputed marks, into thinking that there is a commercial connection between the parties’ businesses leading to misrepresentation and damage.

7. Party B filed counterstatements claiming that the relevant date in these proceedings is December 1993, being the date in which Party B’s predecessor in business began trading and, based on this, Party B makes a claim of being the senior user. It further asserts that to the extent that there is any misrepresentation and/or damage it is Party A’s use that is passing off the earlier marks of Party B.

8. The parties both filed evidence and this will be referred to as and where appropriate during this decision.

9. A Hearing took place over one and a half days on 30 January 2024 and the morning of 31 January 2024, with Party A represented by Mr David Dadds of Dadds LLP and Party B by Mr Rob Jacob of Stephenson Harwood LLP. Party A’s Mr Karim Zigheche and Part B’s Ms Mary Adejumo both appeared for cross-examination.

10. This consolidated group is “Group A” of five groups of proceedings between the parties as shown below:

Group A	Group B	Group C	Group D	Group E
CA505291 (lead file)	CA504693 (lead file)	CA504462 (lead file)	CA504463	CA435891
CA504844	CA504695	CA504464		
CA505290	CA504697	CA504465		
CA503843	CA504699			
	CA504694			
	CA504696			
	CA504698			
	CA504700			

11. The Group E proceedings are currently stayed, but the hearing was in respect of the other groups. Whilst each group is distinct, there are underlying issues and themes that made them suitable to be heard in a single hearing but they will be subject of different decisions.

12. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

**Evidence**

**Party A’s Evidence**

13. Party A’s evidence takes the form of two witness statements, dated 10 January 2023 and 1 June 2023, of Mr Zigheche, director of Party A, the first accompanied by Exhibit KZ1 and the second by Exhibit KZ3. In his first witness statement, Mr Zigheche provides information on the chain of ownership of Party A from 2010 to 17 February 2022 when Party A was assigned the intellectual property rights in BIM’S KITCHEN. He also provides information regarding Party A’s activities and the scale of its business as well as information about Party B.

14. Mr Zigheche’s second witness statement provides a critique of Party B’s evidence regarding genuine use of its marks.

## **Party B's Evidence**

15. Party B's evidence takes the form of the following:

(i) a witness statement, dated 7 January 2023, by Ms Adejumo, sole director of Party B and Annexes MAAO 1 to MAAO 36. Ms Adejumo provides evidence in defence of both the revocation actions and invalidation actions and includes a history of Party B and its predecessor in business, dating back to 1993.

(ii) a second witness statement, dated 29 June 2023, also by Ms Adejumo together with Exhibits MAAO37 to MAAO40. This statement provides a critique of Mr Zigheche's evidence of Party A's use of its BIM'S KITCHEN sign.

## **Hearing**

17. Following a Pre-Hearing Review, it was agreed with the parties that a single hearing would be held to take submissions regarding the four groups of proceedings identified as Group A, Group B, Group C and Group D. This decision relates to the Group A cases. Group D is a single case where Party B challenges another BIM'S mark that is in the name of Mr Zigheche, the witness and controlling mind behind Party A.

## ***Preliminary issues***

### ***Party A's further written submission***

18. On the eve of the hearing, Party A provided further written submissions claiming that, in its skeleton argument, Party B had changed its case in respect of the historical ownership of its claimed goodwill. In particular, Mr Dadds pointed to a claim that Party B had always owned the goodwill from 1995 and that, if not, it was held on trust by Mrs Amole for Party B. Mr Jacob submitted that this was not an attempt to introduce new evidence and that Party B was relying only upon the evidence as admitted into the proceedings. I agreed that it was permissible to rely on these submissions as they amounted to no more than an opinion on what the evidence showed. However, I

recognised that the trust point may require a considered reply and I indicated that I would be prepared to allow Party A to provide written submissions on the point if requested. This was not requested and, further, as will become apparent, the issue played no material role in my decision.

#### *Scope of cross-examination of Ms Adejumo*

19. Party A's request for cross examination of Ms Adejumo was accepted but only in respect of her comments at paragraphs 33 – 35 of her witness statement of 2 February 2023 submitted in support of Party B in Group B cases. These comments are repeated at paragraphs 51 – 53 of her witness statement of 7 January 2023 provided in support of the proceedings subject of this decision (the Group A proceedings) and with the agreement of the parties the cross examination was extended to cover this group too.

#### ***Cross-examination of Mr Zigheche***

20. The scope of the cross-examination of Mr Zigheche was agreed in respect of the Group B proceedings and the proceedings that are the subject of this decision. Cross-examination was agreed on the issue of proof of use (and may also be relevant to the issue of goodwill, where claimed by Party A<sup>1</sup>) as described by Party B's letter of 4 July 2023:

“... it is noted that Mr Zigheche is the only witness that has been proffered by BIMS Walthamstow. Despite not making it clear in his witness statement, it is BIMS African Food Store's understanding that Mr Zigheche was actually not involved with the BIM'S Kitchen business during the Relevant Dates and it is likely to be hearsay evidence. It is therefore contended that the strength of the evidence put forward by Mr Zigheche should be pressure tested under cross examination.”

21. Mr Zigheche sometimes appeared disinterested and often requested that questions be repeated. It appeared to me that this was because English was not his

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<sup>1</sup> As explained in the Registry's letter of 27 September 2023

native language. However, he did understand questions when they were repeated or re-formulated and he would then give cogent answers. I was left with the impression that he provided honest answers to the questions put to him.

22. Cross-examination was undertaken on the basis that it was Party B's position that Mr Zigheche's evidence relating to the activities of his predecessors is hearsay. Mr Zigheche confirmed that any sales before February 2022 (when Party A purchased the business) were communicated to him by the prior owner.<sup>2</sup> He also confirmed that he had no knowledge of the business and its operation when it was run by the original owners or when the second owner, Castell Howell, took over its operation.<sup>3</sup> He confirmed that the sales report provided at Exhibit KZ1, was obtained from Castell Howell but he did not know how the sales included in the report were generated.<sup>4</sup>

23. Mr Zigheche stated that three invoices provided at Exhibit KZ1 (pages 19 – 21) came from the original owner, Mr James Adedje, after one of Mr Zigheche's employees had contacted him by email.

24. Mr Zigheche stated that a list of wholesalers provided at Exhibit KZ1 (page 58) was obtained by Castell Howell from Mr Adedje. He also claimed that the BIMS brand was used on Party A's range of sauces<sup>5</sup> and whilst it sold it in pouches rather than in bottles as Castell Howell did, it retained the same branding.<sup>6</sup>

### ***Cross-examination of Ms Adejumo***

25. The scope of the cross examination was limited to Ms Adejumo's understanding of the chain of title of Party B's business and its goodwill and is relevant to these Group A cases because it goes to Party B's defence that it is the senior user.

26. Ms Adejumo appeared a little unsure in her answers and did not engage regarding the issue of the chain of title of the goodwill despite, at the time, being a director of

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<sup>2</sup> Transcript, [32] from line 6

<sup>3</sup> Ditto at [41] line 3 onwards

<sup>4</sup> Ditto at [51], line 8 to 18

<sup>5</sup> Ditto [42] line 23 to [43] line 9

<sup>6</sup> Ditto, [44], line 14 - 16

Party B. Her responses to questions on the issue were met with a response that she either did not know because she was very young at the time or because she is not an accountant. These responses were evasive in nature, but in light of the written evidence on the issue (that will be referred to later in the decision), they did not lead me to believe that Ms Adejumo's evidence was anything other than what she believed/was able to uncover regarding Party B's claims regarding historical goodwill and chain of title.

27. Ms Adejumo's evidence provides no accounts in relation to the revenue or trading for 2010 or 2011. It was established that Ms Adejumo was company secretary from 2008 but she pointed out that she was very young at the time<sup>7</sup> and that she has failed to find accounts for that period despite finding them for before and after.<sup>8</sup>

28. Ms Adejumo was questioned about the absence, at any time, of any acquisition or purchase of the business from Ms Adejumo's mother, who originally established the business, in Party B's accounts. Ms Adejumo's response was that it was a long time ago and that she didn't know because she is not an accountant.<sup>9</sup> This was put to her more than once, but her responses remained the same.<sup>10</sup>

29. On the trust point discussed as a preliminary issue and detailed earlier, Ms Adejumo was asked if she was aware of any records, minutes or notes forming a trust between her mother and Party B. Her response was that she did not know, adding that she was very young at the time<sup>11</sup> being only about 5 years old when Party B was formed.<sup>12</sup> When asked for confirmation that, because of her age at the time, she was not aware of how her mother's sole trader business was transferred to Party B, Ms Adejumo's response was "I do not know. I am not an accountant".<sup>13</sup>

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<sup>7</sup> Ditto [26] at line 11 and 12

<sup>8</sup> Ditto [27] line 6

<sup>9</sup> Ditto [27] line 15 - 22

<sup>10</sup> See, for example, [28] line 8 of the transcript

<sup>11</sup> Ditto [29] line 6 - 13

<sup>12</sup> Ditto [29] line 12 - 14 where she discloses her current age

<sup>13</sup> Ditto [30] line 15 to [31] line 9

## DECISION

### Revocation proceeding relating to genuine use (CA504843 and CA504844)

30. During the hearing it came to light that, despite putting Party B to proof of use in respect of all its goods, Party A was only concerned about Party B retaining *saucers* and *jams*. The list of goods in respect of which Party B claimed that it had used the marks was provided in its counterstatement (and reproduced at paragraph 4, above) and does not include the terms *saucers* or *jams*. Once this was established, Mr Dadds stated that Party A could accept use in respect of the other goods where use is claimed. Consequently, no further consideration is required and the contested marks can remain registered in respect of the following list of goods:

(1) Class 30: Rice; tapioca and sago; flour and preparations made from cereals; cassava flour, yam flour, semolina flour; bean flour; plantain flour; garri; garri cassava; Honey, Spices

(2) Class 29: Fish, meat; preserved, frozen, dried and cooked fruits and vegetables; preserved or dried seeds and nuts; edible oils and fats; pulses, beans and lentils; soya beans; black eye beans.

(3) Class 33: Palm wine.

31. The revocation cases are successful in respect of the other goods listed in the contested marks' specifications with the revocation dates of 14 January 2022 (3185199) and 11 February 2022 (915823991).

### Grounds based upon Section 5 in invalidation proceedings (CA505290 and CA505291)

32. Party A relies upon grounds based upon Section 5(4)(a). This ground is relevant when considering an application for invalidation by virtue of the following parts of section 47 of the Act, namely:

#### “47 Grounds for invalidity of registration

(1) ...

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground—

(a) ...

(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.

...

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

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

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made:

Provided that this shall not affect transactions past and closed.”

33. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(b) [...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

34. Subsection (4A) of Section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

35. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “a substantial number” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

36. Halsbury's Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

“Establishing a likelihood of deception generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation<sup>1</sup> among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

(a) the nature and extent of the reputation relied upon,

(b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;

(c) the similarity of the mark, name etc used by the defendant to that of the claimant;

(d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

37. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, as the Appointed Person, endorsed the registrar’s assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TM O-212-06* Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’ ”

38. Also in *Advanced Perimeter Systems Limited v Multisys Computers Limited*, Mr Alexander QC considered the relevant date where one or both of the parties have used the mark(s) at issue prior to the date of the application to register the contested mark(s). He explained that:

“41. There are at least three ways in which such use may have an impact. The underlying principles were summarised by Geoffrey Hobbs QC sitting as

the Appointed Person in *Croom's TM* [2005] RPC 2 at [46] (omitting case references):

- (a) The right to protection conferred upon senior users at common law;
- (b) The common law rule that the legitimacy of the junior user's mark in issue must normally be determined as of the date of its inception;
- (c) The potential for co-existence to be permitted in accordance with equitable principles.

42. As to (b), it is well-established in English law in cases going back 30 years that the date for assessing whether a claimant has sufficient goodwill to maintain an action for passing off is the time of the first actual or threatened act of passing off: *J.C. Penney Inc. v. Penneys Ltd.* [1975] FSR 367; *Cadbury-Schweppes Pty Ltd v. The Pub Squash Co. Ltd* [1981] RPC 429 (PC); *Barnsley Brewery Company Ltd. v. RBNB* [1997] FSR 462; *Inter Lotto (UK) Ltd. v. Camelot Group plc* [2003] EWCA Civ 1132 [2004] 1 WLR 955: "date of commencement of the conduct complained of". If there was no right to prevent passing off at that date, ordinarily there will be no right to do so at the later date of application."

39. In *Smart Planet Technologies, Inc. v Rajinda Sharma* [BL O/304/20], Mr Thomas Mitcheson QC, sitting as the Appointed Person, pointed out that "the start of the behaviour complained about" is not the same as the date that the user of the applied-for mark acquired the right to protect it under the law of passing off. Rather, it is the date that the user of that mark committed the first external act about which the other party could have complained (if it knew about it) as an act of actual or threatened passing off. Typically, this will be the date when first offer was made to market relevant goods or services under the mark. However, it could also be the date the first public-facing indication was made that sales were proposed to be made under the mark in future. If the user of the applied-for mark was not passing off at the time such use commenced (usually because no one else had acquired a protectable

goodwill under a conflicting mark at that time), he or she will not normally be passing off by continuing to use the mark.

40. In light of the above guidance, the primary relevant date for assessing whether Party A has the requisite goodwill is the filing date of the contested marks, namely 12 September 2016. Party B claims that it is the senior user and has its own goodwill resulting from its claimed predecessor in business operating since December 1993. Therefore, this is a second potentially relevant date.

### ***Goodwill***

41. I begin by considering Party A's evidence in support of its claim to a goodwill as of the primary relevant date of 12 September 2016. Its relevant evidence can be summarised as follows:

- Two screenshots obtained from the Internet archive "Waybackmachine" are provided. They are both dated 11 March 2016 and consist of images of a number of jars of sauce. It is difficult to see the full detail of the labels because of the size of the images, but at least some of the labels appear to have the BIM'S KITCHEN words appearing before three representations of Africa.<sup>14</sup>
- Three invoices are provided, two of which are dated before the relevant date. The first, dated 29 August 2012, is addressed to AMAZON EU S.A.R.L. in Luxembourg via a PO BOX in the UK. It relates to small consignment of sauces and a spicy African ketchup and totalling just over £80. The name "Bim's Kitchen" appears prominently on this invoice.<sup>15</sup> The second, dated 29 September 2015, is addressed to a customer in Singapore, and is in respect of sauces, ketchups and jams totalling £265.20. Again, the name "Bim's Kitchen" appears prominently at the top of the invoice;<sup>16</sup>
- In his witness statement, Mr Zigheche states that despite being in touch with the original owners of the marks, James Adedji and Nicola Adedji, corroboratory

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<sup>14</sup> Pages 17/18 of Exhibit KZ1

<sup>15</sup> Page 19 of Exhibit KZ1

<sup>16</sup> Page 20 of Exhibit KZ1

documentation has been difficult to obtain<sup>17</sup> but “to [his] knowledge” the business incurred the following sales figures (but not supported by documentary evidence):<sup>18</sup>

<b>Year</b>	<b>Sales Figures</b>
2013	£86,728
2014	£79,874
2015	£89,993
2016	£75,795

- Mr Zigheche states that these sales were predominantly through seven named wholesalers and that the “average sale of Bim’s Kitchen sauce or relish was £2.45 - £2.69. He calculates that in 2013 this equates to 32,240 products being sold;<sup>19</sup>

42. Mr Zigheche provided further evidence in the form of total sales of products offered and a list of customers from the period February 2019 to January 2022.<sup>20</sup> This period starts nearly 2.5 years after the relevant date and, therefore, cannot assist Party A in establishing that it had the requisite goodwill at that date. Consequently, I need say no more about this evidence.

43. It is Party B’s position that all of the relevant evidence is hearsay and should, accordingly, be given very little weight. Following the cross examination of Mr Zigheche, it is clear that he did not have any first-hand knowledge of use of Party A’s mark prior to the relevant date and his evidence is, indeed, hearsay. Section 4 of the Civil Evidence Act 1995 permits hearsay evidence in civil proceedings but provides the following guidance as to the weight to be accorded to such evidence:

“Considerations relevant to weighing of hearsay evidence.

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<sup>17</sup> Mr Zigheche’s witness statement at [10]

<sup>18</sup> Ditto at [11]

<sup>19</sup> Ditto at [12]

<sup>20</sup> Ditto at [14] and Exhibit KZ1, pages 22 - 57

(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard may be had, in particular, to the following -

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.”

44. Mr Zigheche’s obtained information from both of the previous owners of Party A’s mark and this has been put forward in his witness statement. There is no mention in his witness statement that this information was obtained from the previous owners despite a statement that “(t)he contents of (his) witness statement are based upon matters which are within my own knowledge except where otherwise indicated, in which case I have set out the source of my information”. I make two observations on this. Firstly, the fact that, in particular, the historical sales figures were obtained from previous owners concealed (intentionally or not) the fact that it was hearsay evidence. Secondly, the fact that it is not first-hand information, brings into question the accuracy

of the figures. For example, it is not known whether they were recalled from memory by the previous owners (and hence much less reliable) or by reference to recorded accounts, whether all the sales relate to goods bearing the mark relied upon or a variation or even a different mark. Additionally, whilst there is no evidence that Mr Zigeche intentionally made misleading statements in his witness statement, there is clearly a potential motive in concealing the fact that the information obtained from early owners was second-hand information because of the potential impact upon the weight given to the evidence.

45. In short, the sales figures provided cannot be accepted as reliable.

46. In respect of the invoices, these relate to two small-scale sales of £80 in 2012 and £265 in 2015, respectively. This alone (and in the absence of any reliable or verifiable turnover figures) is insufficient to demonstrate the existing of any goodwill. In respect of the internet screen grabs evidenced by Mr Zigeche, the sign BIM'S KITCHEN is visible in the banner at the top of the first page dating from 10 December 2014 and is also just about visible at the top of the labels on two of the three jars shown. The second page, from 11 March 2016 has the sign visible on the label of three of the jars shown. Even where the exhibit is magnified, it is not possible to make out the sign on the other jars. The third and final page is an extension of the second page and has the same date. Eight products are shown, seven of which are variously described as "sauce", "jam" or "relish". The eighth product is a packet of peeled tiger nuts and this is outside the scope of the goods and services relied upon.

47. The invoices when taken together illustrate that sauces, relishes and jams were offered for sale at these two dates, but it is not possible to ascertain from the evidence if there were any sales and if so, what the was the scale of these sales.

48. Taking all of this into account, whilst the evidence illustrates some activity under the sign relied upon, it is not possible to conclude that such activity translated to a protectable goodwill identified by the sign. Party A has, therefore, failed to demonstrate that it has the requisite goodwill and the grounds based upon section 5(4)(a) fails and I do not need to go on to consider misrepresentation and damage.

49. In light of this finding, it is not necessary to consider Party B's claim to be the senior user because it is the current owner of goodwill established from when its predecessor in business commenced trading in December 1993.

## **Summary**

50. Party B's marks have partially survived the two revocation proceeding brought by Party A and they remained registered in respect of the following identical list of goods:

(1) Class 30: Rice; tapioca and sago; flour and preparations made from cereals; cassava flour, yam flour, semolina flour; bean flour; plantain flour; garri; garri cassava; Honey, Spices

(2) Class 29: Fish, meat; preserved, frozen, dried and cooked fruits and vegetables; preserved or dried seeds and nuts; edible oils and fats; pulses, beans and lentils; soya beans; black eye beans.

(3) Class 33: Palm wine.

51. The revocation cases are successful in respect of the other goods listed in the contested marks' specifications with the revocation dates of 14 January 2022 (3185199) and 11 February 2022 (915823991).

52. Party A's two invalidations based upon section 5(4)(a) fail in their entirety.

## **COSTS**

53. In light of the complexity of the proceedings that were subject to the hearing, I indicated that I would seek written submissions on costs after all four substantive decisions are issued covering all the proceedings that were the subject of the hearing. The parties are therefore directed to provide written submissions within 21 days of the date of this decision and these are to address each group of cases in turn. I will then issue a supplementary decision in respect of the costs award in each group of cases.

**Dated this 18<sup>th</sup> day of November 2024**

**Mark Bryant  
For the Registrar**