

O/263/12

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION 2563779
STANDING IN THE NAME OF CHIQUO LIMITED IN RESPECT OF THE
FOLLOWING TRADE MARK IN CLASSES 29, 30 & 31:**



AND

**AN APPLICATION FOR A DECLARATION OF INVALIDITY (NO 84071) BY
INTERSNACK KNABBER-GEBACK GMBH & CO KG**

The background and the pleadings

1) The registered trade mark the subject of these proceedings was filed on 9 November 2010, it was published on 26 November 2010, and it completed its registration procedure on 4 February 2011. At all times the mark has been in the name of Chiquo Limited ("CL"). The mark and the goods for which it is registered are:



Class 29: Peas, beans, dals, rice, nuts and seeds; snacks prepared from peas, beans, seeds and nuts; dried fruits.

Class 30: Flour; spices.

Class 31: Unprocessed edible seeds.

2) Intersnack Knabber-Geback GmbH & Co KG ("Intersnack") seeks the invalidation of CL's registration. Its application for invalidation was filed on 26 May 2011 and is based on grounds under sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). Three earlier marks are relied upon under section 5(2)(b), namely:

i) Community Trade Mark ("CTM") registration 5032727 which was filed on 21 April 2006 and registered on 12 April 2007 for the mark:



in respect of:

Class 29: Extruded and pelletised or otherwise manufactured or processed potato products for snacks; roasted, dried, salted, spiced and seasoned nuts.

Class 30: Extruded and pelletised or otherwise manufactured or processed tapioca, corn, rice or other cereal products for snacks; savoury

biscuits and pretzels; muesli bars, mainly consisting of nuts, dried fruits, processed cereal grains and chocolate; sauces.

ii) CTM 134684 which was filed on 1 April 1996 and registered on 2 February 1999 for the mark:

CHIO

in respect of:

Class 29: Potato crisps, potato sticks, in extruded or pellet form for snacks, prepared potato products for snacks, roasted, dried, salted or savoury nuts.

Class 30: Cereal products in extruded or pellet form for snacks, prepared cereal products for snacks, tapioca-cassava crisps, salted or lye-biscuits, muesli bars, mainly of prepared cereal seeds, nuts, dried fruits and chocolate preparations.

iii) International registration 1011573 which designated the EU for protection on 14 July 2009, protection being conferred later that year, for the mark:

Chio Deluxe Chips

in respect of:

Class 29: Extruded and pelletized or otherwise manufactured or processed potato products for snacks; roasted, dried, salted, spiced and prepared nuts, including with coatings; preserved, dried and cooked fruits.

Class 30: Extruded and pelletized or otherwise manufactured or processed tapioca, manioc, rice, maize, wheat or other cereal products for snacks; savoury biscuits and pretzels; muesli bars, mainly consisting of nuts, dried fruits, processed cereal grains; chocolate and chocolate products; sauces.

3) All three marks constitute earlier marks as defined by section 6 of the Act. Only mark ii), the CTM word mark, completed its registration procedure before the five year period ending on the date of the application for invalidity; the consequence of this is that the use conditions apply to this mark, as per section 47(2A) of the Act. The other two marks are not subject to the use conditions and may, therefore, be taken into account for their specifications as registered. Under section 5(4)(a) Intersnack relies on the use it has made of signs corresponding to

marks i) and ii) in the UK since 2006, with such use claimed to have been made in relation to “snack foods”.

4) CL filed a counterstatement denying the grounds of opposition. CL asked Intersnack to provide proof of use in respect of the earlier marks relied upon; this, however, can only relate to mark ii) given that this is the only mark to which the use conditions apply. Both sides filed evidence. A hearing took place before me on 25 May 2012 at which CL were represented by Ms Isabel Jamal of Counsel, instructed by Waterfront LLP; Intersnack were represented by Mr Roger Grimshaw of Mewburn Ellis LLP.

The evidence

5) Rather than provide an item by item evidence summary, I will instead come back to the evidence when it is relevant to the issues to be determined. However, I set out below who the witnesses are and what, in summary, they give evidence about:

- a) Mr Steven David Harger, Marketing Manager of Intersnack Limited (a subsidiary of Intersnack). He gives evidence (in two witness statements) about Intersnack and its use of the CHIO mark in the UK and EU. He also gives evidence about what he says is the broad range of snack foods sold in the UK which various companies offer under the same brandings.
- b) Mr Roger Grimshaw, Trade Mark Attorney at Mewburn Ellis LLP. He gives evidence about snack foods and their categorization/location in supermarkets (both real and online).
- c) Mr Satish Savjani, a director of CL. He gives evidence about CL’s use of its mark, the goods it sells and its market, contrasting this with the CHIO mark. He also comments on Intersnack’s claims of use, Mr Savjani has not heard of CHIO.

The proof of use provisions

6) The CHIO (CTM) word mark is the only mark subject to the use conditions. A statement of use was made in respect of all of the goods for which the mark is registered, namely:

Class 29: Potato crisps, potato sticks, in extruded or pellet form for snacks, prepared potato products for snacks, roasted, dried, salted or savoury nuts.

Class 30: Cereal products in extruded or pellet form for snacks, prepared cereal products for snacks, tapioca-cassava crisps, salted or lye-

biscuits, muesli bars, mainly of prepared cereal seeds, nuts, dried fruits and chocolate preparations.

7) At the hearing, CL accepted that genuine use of the mark had been made during the relevant period in relation to:

Class 29: Potato crisps; prepared potato products for snacks; roasted, dried, salted or savoury nuts.

Class 30: Salted or lye-biscuits.

8) Although grateful for the concession, Mr Grimshaw, on behalf of Intersnack, argued that wider use had been shown. In terms of a fair specification, I note from his skeleton argument that a specification of snack foods is sought. However, this is not tenable, not only because I consider it too broad a term, but also because such a term is wider than the goods for which the mark is actually registered. Mr Grimshaw, therefore, asked that “pretzels, savoury biscuits and prepared cereal products for snacks” be added to the above list.

9) I have considered Mr Grimshaw’s points in light of the evidence filed by Mr Harger. From the content of his two witness statements it is clear that use has been made in relation to a pretzel and savoury biscuit mix (co-branded Party Mix/Maxi Mix) and pretzels alone (co-branded Stickletti). There is, though, nothing beyond such goods or those conceded as having been used. Of course, I am concerned with a fair specification reflecting use rather than limiting the specification to exact goods. However, the term “prepared cereal products for snacks” is, in my view, too wide a term when the type of use shown is considered. Pretzels and savoury biscuits are not specifically listed in the specification, however, they fall within two of the broad terminologies. I therefore consider the appropriate and fair specifications to be:

Class 29: Potato crisps; prepared potato products for snacks; roasted, dried, salted or savoury nuts.

Class 30: Salted or lye-biscuits; pretzels and savoury biscuits, being cereal products in extruded or pellet form for snacks or being prepared cereal products for snacks.

10) I should add that although I have not set out the case-law in detail, when giving these observations I have fully borne in mind the jurisprudence relating to genuine use¹ and that relating to the arrival of fair specifications².

¹ *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 and *Laboratoire de la Mer* C-259/02.

² See, for example, *Reckitt Benckiser (España), SL v OHIM* Case T-126/03, *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32, *Animal Trade Mark* [2004] FSR 19 and *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited* BL O/345/10

Section 5(2)(b)

11) Section 5(2)(b) of the Act reads:

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

(a)

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

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

12) In reaching my decision I have taken into account the guidance provided by the Court of Justice of the European Union (“CJEU”) in a number of judgments: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77, *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, *Case C-3/03 Matrazen Concord GmbH v GmbGv Office for Harmonisation in the Internal Market* [2004] ECR I-3657 *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05). In *La Chemise Lacoste SA v Baker Street Clothing Ltd* (O/330/10) Mr Geoffrey Hobbs QC, sitting as the Appointed Person, quoted with approval the following summary of the principles which are established by these cases:

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is

permissible to make the comparison solely on the basis of the dominant elements;

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

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion."

The average consumer

13) The case-law informs me that the average consumer is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). The degree of care and attention the average consumer uses when selecting goods or services can, however, vary depending on what is involved (see, for example, the judgment of the General Court ("GC") in *Inter-Ikea Systems BV v OHIM* (Case T-112/06)).

14) The goods involved in the conflict are either snack foods or other basic food items. Although some of the goods, dals for example, may be more suitable for use in cooking Asian food, I reject the argument that this should limit the average consumer to "a discerning customer of Asian/Indian origin" as was put in Mr Savjani's witness statement. This simply reflects CL's marketing strategy and not an objective assessment of the actual goods. The average consumer of all the

goods should be regarded as a member of the general UK population (although in relation to goods such as dals, a subset of the population who have an interest in Asian cooking). None of the goods strike me as the type of goods purchased with a high degree of care and attention. On the contrary, they will be selected by way of a relatively casual approach. I agree with Ms Jamal that they will be selected from a supermarket (or other retail store) shelf, or online equivalent, so meaning that the visual similarities/dissimilarities between the marks will take on more significance than the aural similarities/dissimilarities; although, the aural aspect will not be ignored completely.

Comparison of goods

15) When making the comparison, all relevant factors relating to the goods in the respective specifications should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23 of its judgment:

“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.”

16) Guidance on this issue has also come from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 where the following factors were highlighted as being relevant when making the comparison:

- “(a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

17) In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T- 325/06* it was stated:

“It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

18) In relation to understanding what terms used in specifications mean/cover, the case-law informs me that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”³ and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning⁴.

19) CL’s goods are:

Class 29: Peas, beans, dals, rice, nuts and seeds; snacks prepared from peas, beans, seeds and nuts; dried fruits.

Class 30: Flour; spices.

Class 31: Unprocessed edible seeds.

Mr Grimshaw stated at the hearing that the application for invalidation against flour was no longer pursued – I need say nothing more about these goods.

20) One of the points discussed at the hearing was whether the above goods had the capacity to be sold as snack foods or whether they are just basic ingredient products. This issue has the potential to affect the goods comparison given that Intersnack’s goods are primarily snack foods of one form or another. Some of the goods can clearly be sold as snack foods. “Snacks prepared from

³ See *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281

⁴ See *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

peas, beans, seeds and nuts” are identified as such. Nuts, seeds, dried fruits and unprocessed edible seeds are, in my view, clear examples of goods which can be snacked upon and sold on this basis. That leaves peas, beans, dals and rice. In terms of the evidence on this point, I note that Mr Harger’s evidence demonstrates the availability of various products including rice crackers, habas fritas (a fried broad bean snack), chana dal (a dal product listed on the savoury snack and mixes section of a website) and a chick pea snack product. I have heard, myself, of wasabi peas and beans sold as snack foods, products which are also shown in Mr Grimshaw’s evidence.

21) Whilst when the generality of the terms are considered most people would think of the terms under consideration as raw ingredients, or as cooked products for use as side dishes, it is reasonably clear that there are also categories of such goods which are snack like in nature. The one exception to this is in relation to rice as, although rice can be used in snack foods (rice crackers for example), the rice itself is not the snack. I will bear the different categorizations in mind when I come to make my assessments. If the outcome of the decision is that the opposition succeeds on the basis of one category but not the other, I will go on to consider whether the specification can be amended to reflect this. I will now make the comparison with reference to the applied for goods:

Peas, beans, dals, nuts and seeds [considered as snack foods]; snacks prepared from peas, beans, seeds and nuts; dried fruits

22) At least in terms of these goods, Intersnack’s strongest case lies with its “roasted, dried, salted or savoury nuts” which are included within its CTM word mark specification. All the goods are to be eaten and have the capacity to be eaten as snack foods – this creates an obvious similarity of purpose. There is also the capacity for such goods to be sold in close proximity to each other. Ms Jamal referred to CL’s goods as being niche, but I agree with Mr Grimshaw that, at least in terms of the comparison with nuts, such goods may be sold in fairly close proximity. The nature will vary according to the exact product, but have a similarity in terms of size. There seems to me to be a fairly obvious element of competition.

23) The applied for nuts are clearly identical to the nut goods of the earlier mark, but even in respect of the other goods under consideration **there is still a good deal of similarity.**

Non-snack food versions

24) I should add that for goods such as peas, beans and dals when presented as basic food products or ingredients rather than snacks, I see no real similarity with nuts (or anything else in the earlier marks) when the obvious differences of purpose and channels of trade are borne in mind. Neither do I see a competitive or complimentary relationship. **The goods are not similar to this extent.**

Unprocessed edible seeds

25) I extend my finding in paragraphs 22-23 to these goods. Even unprocessed goods can be snacked upon and the aspects of purpose, channels of trade and competition I referred to above are present here. **There is a good deal of similarity.**

Spices

26) Mr Girmshaw referred to many of the products of the earlier mark having the capacity to be spiced and that the earlier mark also included sauces (this is covered by the stylised CTM). Ms Jamal submitted that none of this created similarity as the purposes and natures were quite different. Whilst I agree with Ms Jamal in respect of spice compared to goods which are spiced (the purpose, channels of trade and nature differ and I see no competitive or complementary relationship) I am prepared to accept that there is a degree of similarity with sauces. Sauces can be used as part of a recipe to add flavour to a particular dish. The same is true of spices. The nature is not quite the same (a dry product compared to a wet product) but there is an overlap in purpose, and there may be a competitive relationship. **There is a reasonable degree of similarity.**

Rice

27) In relation to rice, Mr Grimshaw highlighted that rice cakes (which contain predominantly rice) are types of snack foods. This may be so, but rice is not a rice cake, nor do any of the earlier marks cover rice cakes. In view of this, the point highlighted by Mr Grimshaw has little relevance. Rice is a basic food ingredient which is normally boiled or added to other dishes. It is a staple food product. This, in my view, is not similar to the snack food type products covered by the earlier mark. **Rice is not similar to the goods of the earlier mark.**

Comparison of the marks

28) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The visual, aural and conceptual similarities of the marks must be assessed by reference to their overall impressions, bearing in mind their distinctive and dominant components. I will make a comparison on the basis of Intersnack's word only mark as this is likely to represent its best prospect for success:



29) In terms of the marks' dominant and distinctive elements, the CHIO mark has only one element which does not break down into separate components. The CHIQUO mark, on the other hand, consists of the word CHIQUO and a floral device element on a dark rectangular background. On account of its size and its distinctiveness, the CHIQUO element forms the dominant and distinctive element. It dominates the mark quite significantly, although, not to the extent that the floral element is completely negligible.

30) In terms of concept, neither representative argued that either mark had a particular meaning. In view of this there is neither conceptual similarity or dissimilarity.

31) In terms of the visual comparison the words CHIQUO and CHIO share the same first three letters CHI and both end in O. However, one mark has only four letters and the other six so the CHIO mark is appreciably shorter. The word CHIQUO also contains the letters QU, one of the more unusual letter groupings in the English language. There is, of course, a further difference created by the device element in the CHIQUO mark which contributes further dissimilarity, but I do not consider that this is overly significant when one bears in mind the dominance of the CHIQUO element. Weighing these similarities and differences, I come to the view that there is only a low degree of visual similarity.

32) In terms of the aural comparison, the CHIO mark is likely to be pronounced as CHEE-O (ch as in church, ee as in tea, and o as in the letter itself). The CHIQUO mark is a more difficult mark to articulate and will be pronounced either as CHEE-CO (co as in the abbreviation for company) or CHEE-KWO (kwo as in status quo). Either way, I consider there to be more aural similarity than there is visual similarity – I assess it at a reasonable, but not high level. In both cases, QU (whether it forms part of CO or KWO) stands out to a degree.

The distinctiveness of the earlier mark

33) The degree of distinctiveness of the earlier mark(s) must be assessed. This is because the more distinctive the earlier mark(s) (based either on inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). In terms of the use made of the marks, Mr Harger's evidence provides some details. There has been around five years use with ex factory turnover figures peaking in 2009 at over £700,000. However, little is said about how the goods sold under the mark are promoted or otherwise brought to the attention of the public. I come to the view, despite the CHIO marks being used, that the evidence does not demonstrate that the distinctiveness it possesses has been enhanced to any material extent. However, from an inherent perspective, and, as an invented word, CHIO possesses a high degree of distinctiveness. As the only/dominant part of all the earlier marks then the conclusion is that all of them are high in inherent distinctive character.

Likelihood of confusion

34) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

35) I will deal with a number of arguments which, although fully considered, do not take either party further forward. Firstly, Mr Grimshaw argued that the packaging for the type of goods in question had the capacity to be crinkled with the result that the differences between the marks being less apparent. This is not a persuasive point – to envisage a form of use which does not depict the marks as registered/applied for seems to me to be too artificial. The opposite argument could also be taken in that the crinkling of the packaging may remove the point(s) of similarity. I do not consider this argument to assist Intersnack. Mr Grimshaw also argued that the CHIQUO mark is used in a way in which the Q is green coloured in contrast to the other letters in the mark; Mr Grimshaw felt that this reduced the visual impact of the letter. Ms Jamal accepted that such use was a notional use which could be borne in mind but that the effect was to place greater emphasis on the letter Q. If I were to pin my colours to the mast then my view accords with that of Ms Jamal in that more emphasis is being given to the Q. However, I do not regard this as a strong point either way. A further argument, this time from Ms Jamal, related to the concurrent trade of the parties and the absence of confusion. I have touched on the use made of CHIO. In terms of the use of CHIQUO this comes primarily from Mr Savjani. Whilst use has been made, it is only on a very recent basis (since April 2010) and, furthermore, Mr Savjani states that his company targets grocers who specialize in ethnic food. Parallel or confusion free trade is rarely significant as expressed by Millet J in *The European Ltd v. The Economist Newspaper Ltd* [1998] FSR 283 at p 291 when he stated:

“Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff’s registered trade mark.”

This is a case in point. Given the use the respective parties have made, there has been no real opportunity for confusion to arise so, the fact that none has arisen is indicative of little.

36) In terms of whether there exists a likelihood of confusion, I will consider the position firstly in relation to nuts. This is because if Intersnack cannot succeed here (in respect of goods which I have found to be identical) then it will be in no better position with the other goods it opposes. That the goods are identical is an important point because this could off-set the lower degree of similarity between

the marks (a point Mr Grimshaw highlighted). I must bear in mind the more casual purchase of the goods and the concept of imperfect recollection. I also bear in mind that neither mark has a concept for the average consumer to base his recollections upon. Nevertheless, and despite all these factors, I still come to the view that the marks, due to the level of similarity between them, will not be confused. The shortness of CHIO compared to CHIQUO and the differences created by the QU provide acute enough differences for the average consumer to distinguish between them even when identical goods are in play. That there may be more aural similarity than visual similarity does not persuade me, when the degrees of similarity are considered, together with the predominantly visual selection of the goods, that there is a likelihood of confusion. **The ground of opposition under section 5(2)(b) fails.**

Section 5(4)(a)

37) I confirm that have I given full consideration as to whether the opponent is better off under this ground, but I can see no reason for coming to that view and, therefore, even though Intersnack may have the requisite goodwill, it would have failed to establish a misrepresentation for similar reasons to that already given above. **The opposition under section 5(4)(a) is dismissed.**

Costs

38) The applicant has been successful and is entitled to a contribution towards its costs. I hereby order Intersnack Knabber-Geback GmbH & Co KG to pay Chiquo Limited the sum of £1800. This sum is calculated as follows:

Preparing a statement and considering the other side's statement
£300

Considering and filing evidence
£800

Attending the hearing
£700

39) The above sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful

Dated this 6th day of July 2012

**Oliver Morris
For the Registrar,
The Comptroller-General**