

O-250-14

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO 2512666 FOR A SERIES OF TWO
TRADE MARKS



IN THE NAME OF GOLDEN DELIGHT FOODS LTD

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY THEREOF
UNDER NO 500086
BY KYRIACOS POUTJOURI

Background

1. Registration no 2512666 is for the series of two trade marks shown on the cover page of this decision. It stands in the name of Golden Delight Foods Ltd (“the registered proprietor”), has a filing date of 28 March 2009 and was entered in the register on 17 July 2009 in respect of the following goods in Class 29:

Food, fresh and frozen chicken kebabs in a marinade.

2. On 3 July 2013, Kyriacos Poutjiouri (“the applicant”) filed an application to declare the registration invalid under the provisions of section 47 of the Trade Marks Act 1994 (“the Act”). He did so on grounds under section 5(4)(a) of the Act alleging passing off on the basis of an earlier right used in the UK since 1994. At the relevant part of the form, the applicant provided a representation of his earlier right as set out below.



kakos
KEBABS
Kebab Specialists

3. The form invites applicants to provide a representation of the trade mark/earlier right relied on, with a separate sheet to be completed for each one relied upon. Whilst the extract from the form shown above appears on a single page, it is clear from his statement on the form that it has been incorrectly completed and what appears above are two separate marks/rights. Nothing hangs on this error and I take both of them into account in this decision.

4. The applicant puts his claim thus:

“I came up with the name “Kakos Kebabs” in 1994 when I was a sole trader. In 1998 I incorporated the company KZP Limited and traded KZP Limited as Kakos Kebabs. From 2007 I allowed others to use the name “kakos Kebabs”. In 2002 I had professionally designed for me and at my expense the trade mark as set out in the box above. I began to use it from that year myself or I gave temporary permissions for others to use it. The trade mark was redesigned in 2004 to include a statue, as set out in the box above.

My businesses, and those to which the mark was applied were all involved in the manufacture and wholesale provision of kebab meat of one sort or another to retail outlets.

The name Kakos Kebabs and the mark are popular and well known in this market sector. The mark gave rise to considerable trust, recognition and goodwill. I registered the name “kakos Kebabs” under section 1200 to 1206 of the Companies Act 2006 in 2007.

Golden Delight Foods do not have my permission to use the mark as set out above, or the name “kakos Kebabs”. They came to know the mark through me working with them. They have never had my permission or consent to register the mark as a registered trade mark. I continue to work in the kebab meat industry and am allowing Flavour Foods Ltd, my son in law’s business, to use the name Kakos Kebabs and the mark. The registered owner, in using the mark is misrepresenting that its business is associated with my son in law’s business, or that it is acting under my authority or as my agent. They are accordingly, trading off my reputation acquired over the last 11 years. This is causing injury to my son in law’s business by the trade mark owner diverted to it. Moreover the registered owner has recently (1st February 2013) attempted to prevent my son in law from continuing to use my own business name and the trade mark, which would be to the obvious detriment of my son in law’s business.”

5. Despite the claim set out above that a reputation has been built up over the “last eleven years”, the applicant claims to have used the marks throughout the UK since 1994 in respect of:

chicken kebab meat production manufacture and wholesaling, for the provision of chicken kebab meat and ancillaries to kebab retail outlets nationwide.

6. The registered proprietor filed a counterstatement in which it did not comment on the specific claims made by the applicant but stated: “I deny and very strongly object to any proposal to cancel our registered trade mark”.

7. Both parties filed evidence and the matter came before me for a hearing on 29 May 2014. Mr Aubrey Craig of counsel instructed by Dass Solicitors represented the registered proprietor and appeared by telephone having filed a skeleton argument. The applicant, who had been legally represented throughout the pendency of these proceedings by Kidwell Solicitors, represented himself in person at the hearing and was accompanied by his daughter, Christina Georgiou.

Preliminary issue

8. The hearing of these proceedings had originally been set to take place on 8 May 2014. Shortly before that date, the registered proprietor made an application for security for costs against the applicant. In brief, it claimed the applicant’s financial position was such that he was unlikely to be in a position to pay any award of costs should the registered proprietor be successful in defending its registration. It sought security in the sum of £16,050 or “such sum as was deemed reasonable and proportionate”. It recognised that the request was a late one but submitted that

exceptional circumstances existed which justified the request. Given the seriousness of the request, the fact that Mr Poutjiouri would be representing himself at the hearing and following the receipt of correspondence from his solicitors indicating that he would resist the request, I postponed the hearing so as to allow him time to prepare his argument. The hearing was re-arranged at the earliest possible date and I indicated to both parties that I would deal with the security for costs issue as a preliminary matter and proceed to the substantive hearing only in the event the request was refused. The applicant's solicitors subsequently filed submissions and a witness statement objecting to the request.

9. On the morning of the re-arranged hearing, Mr Craig filed an authority which he indicated he intended to refer to at that hearing in support of the request. At the start of the hearing, he made it clear that whilst he considered the request was justified, he now took the view that it was sensible in all the circumstances to proceed to the full hearing on the merits of the case rather than continue with the request for security for costs. Whilst that raises the question as to why the request was made in the first place and was seemingly still live on the morning of the hearing given the filing of the authority, I considered it was a pragmatic approach and I therefore made no decision on the issue of security for costs.

The evidence

10. Evidence was filed by Kyriacos Poutjiouri and Christina Georgiou on behalf of the applicant and by Socrates Camenon on behalf of the registered proprietor.

11. From the evidence, the following undisputed facts are derived:

1984: From this time, Mr Camenon was the managing director and a shareholder in Selective Fayre Ltd.

1994: The applicant began trading as a sole trader under the name Kakos Kebabs. Kakos is said to be a recognised abbreviation or pet-name within the Greek community for the forename Kyriacos.

9 June 1998: KZP Ltd, which traded as Kakos Kebabs, was incorporated by the applicant (SC1 page 8).

2002: Art Attack Design Associates Ltd were appointed to prepare artwork for KZP Ltd. A letter from them (KP1 page 1), addressed 'To whom it may concern' is dated 27 June 2013 and is signed by Roland Smith, Director. The letter states:

"During February 2002, through a mutual customer I was introduced to Kyriacos Poutjiouri (Charlie) I was requested by Charlie to help design and produce marketing material and a brand identity for his products.

This was KAKOS and KAKOS KEBABS, along with some identity for his holding company KZP Ltd (see some samples below)....The work was produced over a period of about 12 months from May 2002 til approximately July 2003".

The samples shown at the bottom of the page include the second of the two marks set out at paragraph 2 above.

2004: Telford Marketing was appointed to produce labels to use on KZP Ltd's chicken kebab products. A copy of the design which was produced (KP1 page 4) is in the form of a printer's proof and bears the first of the two marks set out at paragraph 2 above. The page bears the date 6/10/04 and the label shown on it bears the name and address details of KZP Ltd. It is accompanied by an email from Andrew Telford of that company (KP1 page 2) which was sent to "Charlie" at flavourfoods@live.co.uk confirming the first order for the labels was placed in 1994.

28 July 2004: Melas Frozen Foods Ltd was incorporated (SC1 pages 5-7).

15 December 2006: Melas Frozen Foods Ltd changed its name to KPZ Ltd (SC1 pages 5-7). Its director was the applicant's daughter, Christina Georgiou, the company traded as Kakos Kebabs and the applicant and his wife were shareholders.

Following discussions between Mr Poutjiouri and Socrates Camenon about the respective companies, KPZ Ltd and Selective Fayre Ltd merged to create a new company called Golden Delight Foods Ltd. There was no formal, written agreement between the two men or the respective companies.

26 March 2007: Golden Delight Foods Ltd was incorporated. As part of the agreement, Christina Georgiou was appointed as a director with 30% of the share capital issued to her and 53% to Mr Camenon, a figure based on their former companies' annual turnover indicated to be some £2m and £3.5m respectively. The remaining 17% was issued to one Michael Petrouis.

8 June 2007: Golden Delight Foods Ltd paid KPZ Ltd t/a Kakos Kebabs £16893.67 for the acquisition of its trading stock (invoice at SC1 page 2).

11 June 2007: KPZ Ltd t/a Kakos Kebabs invoiced Golden Delight Foods Ltd for various items of plant and equipment, the invoice being paid by Golden Delight Foods Ltd a short time later (invoice at SC1 page 3).

19 November 2008: KZP Ltd was dissolved following a voluntary creditors liquidation (SC1 pages 8-14).

13 October 2009: KPZ Ltd was dissolved (SC1 pages 5-7).

2007-2011: Mr Poutjiouri worked for Golden Delight Foods Ltd. He left the company in 2011 (page 2 attached to the second witness statement of the applicant shows a P60 certificate for the end of year 2007-2008).

12. In addition to the above, Mr Camenon states that whilst there was no formal written agreement between him and Mr Poutjiouri or the respective companies, he kept a record of the terms of that agreement. (SC1 page 1 and dated May 07). One of the terms recorded shows that "All rights to Intellectual Property will be transferred to Golden delight Foods Ltd". He states that Errington Walker, the company by whom the liquidator appointed for KPZ Ltd was employed (SC1 page 14), issued an

invoice to Golden Foods Ltd dated 3 October 2007 relating to that sale. A copy is exhibited at SC1 page 4 and shows:

“To Golden Delight Foods Limited re: KPZ Limited –In liquidation

Sale of goodwill and intellectual property	£1000.00
VAT @17.5%	£175.00
TOTAL	£1175.00”

13. Mr Camenon states when the applicant left Golden Delight Foods Ltd in June 2011, he set up as a competitor under the name KG Kebabs Ltd. That company merged with a company previously known as Chicken George which then went into liquidation. A new company was then formed called Flavour Foods Ltd. Mr Camenon states that he has approached Birmingham Trading Standards regarding the unauthorised use of Kakos and Kakos Kebabs by this company and has provided a witness statement to them to support this (SC1 pages 15-17).

14. For his part, Mr Poutjiouri states that the registered proprietor did not and does not have his permission or consent to register or use the marks the subject of this decision or his name Kakos Kebabs. He states he continues to work in the kebab industry and allows his son-in-law’s business, Flavour Foods Ltd, to use the name Kakos Kebabs. He acknowledges the involvement of Trading Standards and states they are aware of these proceedings but have not yet taken any further action. He claims that the registered proprietor is “misrepresenting that its business is associated with my son-in-law’s business, or that it is acting under my authority or as my agent”. He is adamant he would not have sold his name and certainly not for the £1000 claimed. In support of his claim that he retains rights in the name he exhibits a copy of a certificate of business registration issued by “National Business Register” (KP1 page 12) showing registration of the business name Kakos Kebabs in Mr Poutjiouri’s name. He disputes the authenticity of the “heads of term” agreement exhibited by Mr Camenon and denies there was any transfer of the intellectual property rights to Golden Delight Foods Ltd.

15. Also exhibited to Mr Putjiouri’s witness statement are the following:

Page 5: said to be a copy of a poster used by the registered proprietor which is said to show how the registered proprietor is using the same mark Mr Poutjiouri commissioned from Telford Marketing. The quality of the print is poor but I can see part of the statue device shown above at paragraph 2. It is not dated.

Page 6: said to be a copy of a leaflet. There is no leaflet and all I can see is what appears to be a print of something resembling a business card. Kakos Kebabs is shown in stylised word form as are contact details for KZP Ltd. It is not dated.

Page 7: said to be a copy of headed paper “my daughter used when KPZ traded as Kakos Kebabs”. The quality of the print is again poor. The top of the page is incomplete but appears to bear the words KAKOS KEBABS in stylised

form. The only part of the heading I can make out are the words Telephone, Fax, Email. At the centre of the page is a signature which appears to be K Poutjiouri but there is no text above it. At the bottom of the page is KPZ Limited t/a Kakos Kebabs. The page is not dated.

Page 8: a copy of a letter on KZP Ltd headed paper and bearing the words Kakos Kebabs in stylised form. It appears to be a fax header sheet addressed to an individual at the Bank of Scotland in Birmingham and is dated 23 May 2002.

Page 9: a copy of a fax said to be sent to the HSBC bank and dated 16 January 2004 though no address details or date are visible on the copy before me. It is headed KZP Ltd and bears the stylised words Kakos Kebabs.

Page 10: this page is headed 'Price List' and bears a date of 2 March 2007. It is on Kakos Kebabs headed paper with KPZ Ltd t/a Kakos Kebabs shown on the page.

Page 11: a copy of an invoice to a fish bar in Stafford. It is said to be dated 2 March 2007 but the poor quality of the print means that the date is not legible to me. The invoice requests cheques to be made payable "to KPZ Limited only".

16. In her witness statement, Christina Georgiou states the merger of the two companies came about because Mr Camenon was in severe financial difficulties but that working together would benefit both companies. (She refers to the merger being between KPZ Ltd and Golden Delight Foods Ltd). A trial period was proposed to ensure the logistics would work as both companies were, she states, relatively small. She states that in October 2007, the companies merged though no formal agreements were drawn up. She states she has never been in any meeting with Mr Camenon or her father about transferring the name nor did she sell, assign or otherwise dispose of the name.

17. Mr Camenon submits that "it defies common sense to assert that I or [the registered proprietor] would acquire the business of Kakos Kebabs on the footing that any right to use the name...might be withdrawn at any time and the name used by a competing business".

18. That completes my summary of the evidence to the extent I consider it necessary.

The law

19. The application for invalidation of the registration is brought under the provisions of section 47 of the Act, the relevant part of which states:

"47.-(1)

(2) The registration of a trade mark may be declared invalid on the ground -

- (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
- (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(3) ...

(4) ...

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

(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.”

20. Section 5(4) of the Act states:

“5(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...

- (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.”

21. The objection under section 5(4)(a) is based on a claim of passing off. In deciding whether the applicant’s mark offends against this section, I refer to the guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731 which is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

- (1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

- (2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods

or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House's previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House."

22. The first hurdle for the applicant is to show that he has goodwill. Goodwill was described by Lord Macnaughton in *IRC v Muller & Co's Margarine Ltd* [1901] AC 217 in the following terms:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seem to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such. For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again."

23. Parker J in *Burberrys v J C Cording & Co Ltd* [1909] 26 RPC 693 said:

"The principles of law applicable to a case of this sort are well known. On the one hand, apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled by the use of any word or name, or indeed in any other way, to represent his

goods as being the goods of another to that other's injury. If an injunction be granted restraining the use of a word or name, it is no doubt granted to protect property, but the property, to protect which it is granted, is not property in the word or name, but the property in the trade or good-will which will be injured by its use. If the use of a word or a name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure another in his trade or business."

24. The applicant claims that Kakos Kebabs is "his name" and derives from his formal forename. Whilst Kakos itself may be a name by which he is known within his community and he may have adopted in business use, that is not a factor which I can take into account. His application for invalidation is based on his claim to have rights in the two marks shown at paragraph 2 above.

25. There is some, albeit limited, evidence that KPZ Ltd traded as Kakos Kebabs (see KP1 pages 7, 10 and 11). Christina Georgiou states that she was the Director of KPZ Ltd with her parents being shareholders. This company merged with another to form Golden Delight Foods Ltd which was incorporated on 26 March 2007. There is unchallenged evidence that the newly formed company bought the stock and equipment of KPZ Ltd (SC1 pages 2 and 3).

26. Mr Camenon has also filed evidence to support his claim that the sale of KPZ Ltd's intellectual property formed part of that agreement (SC1 page 1) and further evidence that the liquidator appointed to handle KPZ Ltd's closure invoiced Golden Delight Foods for the sale of that intellectual property (SC1 page 4). In his witness statement, Mr Poutjiouri states he has not seen the document containing the heads of terms and questions its authenticity. He states that he considers the invoice from Errington Walker relating to the sale of intellectual property to be a forgery. In her witness statement, Ms Georgiou states she has not seen the Errington Walker invoice either and also believes it to be a forgery as she would have seen it as she was the Director of KPZ Ltd.

27. In *Extreme Trade Mark*, BL O-161-07, 7 June 2007, Mr Richard Arnold Q.C. sitting as the appointed person, said:

"36. Where... evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness's evidence despite having had the opportunity to do so, then I consider that the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness's evidence.

37. Despite this, it is not an uncommon experience to find parties in registry hearings making submissions about such unchallenged evidence which amount to cross-examination of the witness in his absence and an invitation to the hearing officer to disbelieve or discount his evidence. There have been a

number of cases in which appeals have been allowed against the decisions of hearing officers who have accepted such submissions. Two recent examples where this appears to have happened which were cited by counsel for the proprietor are *Score Draw Ltd v Finch* [2007] EWHC 462 (Ch), [2007] BusLR 864 and *EINSTEIN Trade Mark* (O/068/07). Another recent example is *Scholl Ltd's Application* (O/199/06). I consider that hearing officers should guard themselves against being beguiled by such submissions (which is not, of course, to say that they should assess evidence uncritically)."

28. The disputed invoice is dated October 2007. The applicant states he has "attempted to question Errington Walker, however, they themselves have been dissolved". The "Heads of Terms" document is said by Mr Camenon to be a note he took for his own records. The applicant has not adduced any evidence to contradict these documents and did not seek to cross examine Mr Camenon on his evidence and I intend to take them at face value. That said, the fact remains that neither document identifies what specific intellectual property was involved and so neither of them go anywhere near proving which particular rights were bought by Golden Delight Foods Ltd.

29. At the hearing, Mr Craig submitted that the applicant, perhaps understandably given his admitted lack of knowledge of trade mark and other law, was confusing the different legal requirements and implications of business names, company registrations and trade mark rights, a point that was accepted by Mr Poutjiouri. The fact that he may have a registration for his business name with National Business Register (KP1 page 12), is not registration under any statutory system and is neither registration as a limited company under the Companies Act nor, as Mr Craig pointed out, does it afford him any trade mark or passing off rights of itself.

30. Mr Craig referred me to the case of *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697 where Millett LJ stated:

"It is well settled that (unless registered as a trade mark) no one has a monopoly in his brand name or get up, however familiar these may be. Passing off is a wrongful invasion of a right of property vested in the plaintiff; but the property which is protected by an action for passing off is not the plaintiff's proprietary right in the name or get up which the defendant has misappropriated but the goodwill and reputation of his business which is likely to be harmed by the defendant's misrepresentation: see *Reddaway v. Banham* [1896] A.C. 199 per Lord Herschell; *Spalding v. Gamage* (1915) 32 R.P.C. 273 at page 284 per Lord Parker; *H.P. Bulmer Ltd. and Showerings Ltd. v. J. Bollinger SA and Champagne Lanson Pere et Fils* (the *Bollinger* case) [1978] R.P.C. 79 at page 93-4 per Buckley L.J."

31. Pumfrey J in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 commented upon the evidence that is required to establish goodwill (which is often referred to as reputation) and said:

"27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground

of opposition is raised the Registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under Section 11 of the 1938 Act (See *Smith Hayden (OVAX)* (1946) 63 RPC 97 as qualified by *BALI* [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed at the relevant date. Once raised the applicant must rebut the prima facie case. Obviously he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of possibilities that passing off will occur."

32. The relevant date in these proceedings, is 28 March 2009, the filing date of the registration under attack. The applicant has to show he had goodwill at this date. The evidence filed is not extensive but shows a fairly complicated history and interrelationship of various companies, the majority of which the applicant is said to have had some sort of involvement in (though not necessarily in any formal rôle).

33. At the hearing, Mr Poutjioui gave me a brief background of his commercial history. Whilst, at times, he strayed slightly into giving evidence rather than confining himself to submission, given his lack of familiarity with hearings of this nature, it is not surprising that he did so. Mr Craig, commendably, did not interrupt him but I confirm that such evidence as was given has not formed part of my decision.

34. As for the evidence which has been filed in these proceedings, it is not disputed that the applicant traded for four years (until 1998) as a sole trader and neither is it disputed that he came up with the name *Kakos Kebabs* or that he commissioned various artwork incorporating this name. But there is nothing within the evidence which shows that the applicant himself has traded in any goods or services under the marks he relies on in these proceedings or that any else has so traded with his consent. There is no evidence of e.g. any turnover for any goods or services sold or provided under either of the marks relied on (or any other marks) which might have accrued to him (or to any other person with his consent) nor is there any evidence of him (or any other person with his consent) having undertaken any advertising. There is no evidence from the trade, the public or any other third parties which shows any use of the marks relied upon at any date and certainly nothing that shows what the position might have been at the relevant date.

35. Taking all matters into account, the applicant has not shown that he has the requisite goodwill in either of the marks he relies upon. That being the case, the application brought under the provisions of section 5(4)(a) of the Act fails at the first hurdle.

Summary

36 The application for a declaration of invalidation of the registration fails.

Costs

37. The application having failed, the registered proprietor is entitled to an award of costs in its favour. In making the award, I take into account that the application was made on the basis of a single ground, the counterstatement filed by Mr Camenon himself was brief in the extreme, both parties filed (limited) evidence and that a hearing took place. I also take into account the fact that the late request by the registered proprietor for security for costs caused the original hearing to be postponed with the applicant then filing a further witness statement and submissions to challenge that request but that in the event the request was not pursued at the re-arranged hearing.

38. Taking all matters into account, I order Kyriacos Poutjiouri to pay Golden Delights Foods Ltd the sum of £1000 as a contribution towards its costs. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 6th day of June 2014

**Ann Corbett
For the Registrar
The Comptroller-General**