

BEFORE THE FINAL APPEAL COMMITTEE OF THE ADVERTISING STANDARDS
AUTHORITY OF SOUTH AFRICA

In the matter between -

MATTER NO:

BLISS BRANDS (PTY) LTD

Appellant/Advertiser

and

COLGATE-PALMOLIVE (PTY) LTD

First Respondent/Complainant

COLGATE-PALMOLIVE COMPANY

Second Respondent/Complainant

DATE OF HEARING: 20 July 2020

Before: Judge B M Ngoepe, Chair, Final Appeal Committee

Mr A Mokoena, Member, IAB Representative

Mr M Neethling, Member, MASA Representative

Mr M Gendel, Member, ACA Representative

DECISION

Judge B M Ngoepe, Chair

1. This is an appeal by Bliss Brands (Pty) limited (“appellant”) against the Ruling of the Advertising Appeal Committee (“AAC”) of the Advertising Regulatory Board, dated 27 April 2020. The AAC’s Ruling overturned the Ruling of the Directorate of the Advertising Regulatory Board, dated 21 January 2020. The Directorate’s Ruling followed a complaint lodged by Colgate-Palmolive (Pty) Limited (“first respondent”) together with Colgate-Palmolive Company (“second

respondent”) on 9 December 2019. For the sake of convenience and because of privity of interest, the two respondents will jointly be referred to herein as (“respondent”).

2. The appellant and respondent are competitors in the germ protection soap market. The packagings in dispute are in respect of Appellant’s product, “*SECUREX*”, while the respondent’s product is “*PROTEX*”. Images of the parties’ respective packagings across various variants are filed of record for comparison and scrutiny.
3. In its complaint, the respondent contended that its *PROTEX* packaging architecture had acquired reputation and advertising goodwill. It charged that the appellant’s *SECUREX* packaging was in breach of clauses 8 (confusion) and 9 (imitation) of Section II of the Advertising Code. The problem was not simply the use of similar colours, and the use of some of the words on the different variants. The respondent came to this conclusion after comparing the packaging architecture of both produces. We go later in detail into the core aspects of the respondent’s complaint.
4. In its letter dated 6 January 2020, the appellant denied any breach of Clauses 8 or 9 of Section II of the code. *“In short, the (appellant) denies that its ‘SECUREX’ soap variant packaging exploits the advertising goodwill of the (respondent’s) ‘PROTEX’ trade name, advertising campaign or advertising property”*. The appellant also denied that *“its SECUREX soap packaging and labelling constitutes an imitation or copy of the (respondent’s) PROTEX soap packaging, or any part thereof ...”*.

5. It is common cause that the appellant's SECUREX product was launched in 2011, with its packaging then. The packaging was refreshed in 2018. It was that packaging that the respondent felt had become too close to its own. Between 2011 and 2018, the appellant managed to capture 2.7% of the relevant market dominated by the respondent with some 32%.
6. It is true, as the appellant says, that the respondent does not have a monopoly over the colours of the packaging, the variant names or accompanying images as they are not distinctive. Indeed, the respondent indicated repeatedly that it did not have monopoly over these elements individually:

"17. For the sake of clarity, Colgate does not claim exclusivity in respect of colour of the packaging alone, or the variant name alone, or accompanying imagery alone, or the particular colour and stylization of the trade name alone, etc, but rather contends that it is the combination of these elements on a germ protection soap product's packaging that amounts to original intellectual thought and protectable advertising property." This point was later repeated:

"29. Once again, and for the avoidance of any doubt, we make it clear that Colgate is not attempting to claim a monopoly over any particular colour (or fragrance, etc). Rather, it is the combination of certain crafted elements, features appearing on, and architectural design of, the 'PROTEX' product packaging and/or label, which constitutes original intellectual thought and protectable advertising concepts, elements and symbols, and which Bliss Brands has exploited/imitated in its 'SECUREX' product packaging. The exploitation by Bliss Brands is simply exacerbated by the fact that Bliss Brands has sought to

adopt a trade name having a similar (if not identical) connotation which it has chosen to present in similar stylization and colours, to that of Colgate's trade name".

7. In dismissing the complaint, the directorate opined that had the respondent complained against the 2011 packaging architecture of SECUREX, he would have found the investigation warranted. The Directorate held it against the respondent for not having done so then (2011). It held that the elements that could have been investigated and protected should have been raised many years ago. It would, said the Directorate, be contrary to the spirit of the Code to allow a complaint after a competitor had participated in the market for years. In our view, the AAC correctly disagreed with this reasoning and conclusion, for the reasons therein set out; for example, that market or category leaders are not required to police new entrants. As the AAC puts it, the *"proper approach must take account of the dynamics between challenger or disruptor brands and brand leaders or category leaders."* There are other considerations why the AAC's reasoning is correct, and the Directorate wrong. Firstly, there is no prescribed period within which a complaint must be lodged. There are other considerations counting against the Directorate's reasoning. It would lead to an avalanche of complaints by established brands for fear that any failure to complain promptly would later be held against them. There must be an understandable level of tolerance by market leaders against what many initially look like insignificant infringements; after all many starters fall by the wayside against big brands. As the AAC puts it, it is not for established brands to police new entrants to advise them against infringement. Newcomers must always realize that there is a risk in exploiting someone else's goodwill or in imitating it. It is not for nothing that the

Code is a public document; it is for the consumption by aspirant market entrants as well, to deter them from possible transgression; they should adapt their conduct and business affairs in accordance with the Code. Failure to do so must be at their own peril. It cannot possibly be a valid defence to say a complaint should have been brought earlier. There is a further aspect in this matter: around 2015, the respondent's current packaging was launched, with some minor amendments in 2016. Notably, it was thereafter that the appellant introduced some features to its packaging architecture that triggered the complaint. The Directorate does not seem to have given adequate consideration to this. The matter must be considered on the basis that the 2018 changes effected by the appellant to its packaging were themselves material, as it will be shown later with reference to the findings of the AAC.

8. The appellant sought to make much of the fact that its trade name "SECUREX" was a registered trade name. That is not the issue. The real issue is how you play with various elements, admittedly mostly generic such as colours, around or in relation to that brand. Imagery is also important.

- 8.1 With regard to the respondent's product, the AAC describes the following elements as making up its distinctive packaging:

"Colgate's 'Protex Packaging Architecture' is a combination of its constituent parts. The name, the imagery, the words, and the other aspects – the font and sheen, the size and positioning of the name, the positioning of the images, the colours used depending on the variant – all of these, in our view, combine to produce a unique packaging architecture".

8.2 Against the above description and in light of other features of the “PROTEX” packaging architecture, the AAC, after due comparison, came to the following conclusion – which is worthy of full reference given its importance:

“18. In 2018 the SECUREX packaging was changed. The name remained the same, being printed in the same navy blue colour, and at the top of the packaging, as Protex. However, the sheen and the font of the name on the new packaging brought it closer to the font used for Protex. Certain of the variant names were changed: the blue ‘mountain dew’ became ‘fresh’ – the same name used for Protex blue; the green ‘herbal fresh’ became ‘herbal’ – the same name used for Protex green; the pink ‘soft touch’ became ‘care’ similar to ‘gentle’, the name used for Protex pink; and the orange ‘on the move’ became ‘active’ – not the same name as ‘suncare’, the name used for Protex yellow. In addition, the variant images were all moved from the bottom left of the packaging to the bottom right where the Protex images are placed.

19. Some of the Securex variant images were changed in 2018. The blue water droplet remained a droplet but was depicted differently – Protex uses a wave. The green leaf was changed to an aloe – Protex uses a flower. The pink feather remained a feather but was also depicted differently – Protex does not have an image on its pink ‘gentle’. The orange arrows were replaced by a soccer ball – Protex uses a sun.

20. In our view, the 2018 changes to the Securex packaging moved the packaging even closer to the Protex packaging than before.”

The colours of the appellant's 2011 packaging across variants, are deeper or richer than those introduced in 2018, bringing its latter packaging closer to the respondent's.

9. It is our view that the approach adopted by the AAC was the correct one as opposed to that by the Directorate, and also that the conclusion that SECUREX's 2018 packaging brought it closer to that of PROTEX, is correct. What now remains is the application of the findings to the relevant clauses of the code, namely Clauses 8 and/or 9.

Clause 8

10. The clause reads:

“8. Exploitation of advertising goodwill

8.1 Advertisements may not take advantage of the advertising goodwill relating to the trade name or symbol of the product or service of another, or advertising goodwill relating to another party's advertising campaign or advertising property ...”

The clause goes on to say that consideration will be given to *inter alia* the likelihood of confusion and the diminution of advertising goodwill. The respondent commands approximately 32% of the market and has established itself over many years. There can be no doubt that it has established advertising goodwill. This is backed by the fact that it had, over a long period of time, consistently been using its packaging with some minor changes made only around 2016. The appellant has exploited respondent's goodwill relating to PROTEX. Given the overall similarity between the two, we are of the view that

there is the likelihood of confusion. Needless to say, there need not be proof of actual confusion; it is sufficient to establish the mere likelihood.

Clause 9

11. The relevant part of the clause reads:

“9. Imitation

9.1 An advertiser should not copy an existing advertisement, local or international, or any part thereof in a manner that is recognizable or clearly evokes the existing concept and which may result in the likely loss of potential advertising value”.

The clause goes on to state that the likelihood of confusion or deception is not a requirement. Given the substantive overall similarity between the two competing architectures, we again agree with the finding of the AAC, and the reasons it gives, that there has indeed been a breach of clause 9.

12. I do not find anything wrong with the approach adopted by the AAC, or its reasons for coming to the findings and conclusion it did. I am not convinced that the AAC is wrong. In my view, the appeal should therefore fail. One is acutely aware that creativity should not be stifled; but to allow imitation masquerading as creativity does nothing to nurture or encourage the latter.
13. I have read Mr Mokoena’s Decision. Although the path his pen travels is here and there different from mine, the reasons are substantially the same. I agree with him as he does with me. I have also read Mr M Neethling’s Decision which comes to an opposite conclusion and in which Mr M Gendel concurs. The result is therefore a tie as we are four in number. In terms of Clause 14.13 of the

Procedural Code, I have a casting vote as the Chair of the Final Appeal Committee. I hereby exercise it in favour of the decisions and conclusions arrived at by myself and Mr Mokoena, for the reasons set out in my Decision. It is also for those reasons, which I need not repeat, that I disagree with Mr Neethling. **Accordingly, the following Orders are the Orders of the Final Appeal Committee of the Advertising Regulatory Board:**

13.1 The appeal is dismissed with costs.

13.2 The appellant forfeits its refundable costs to the respondent.

13.3 The Decision of the Advertising Appeal Committee dated 27 April 2020, and the Orders therein made, are hereby confirmed; save that regarding the withdrawal of the offending packaging, the appellant is given until 30 September 2020 to comply.

Remarks

Prior to the hearing of the appeal, and upon my inquiry, I was told by the Chief Executive Officer of the ARB that they could only secure a panel comprising 4 people. The fault was not with the ARB, but with the members for failing to nominate their representatives at least to the Final Appeal Committee. It is hoped this will be done sooner rather later. I noticed that members of the AAC were also 4 in number; fortunately, they produced a unanimous Decision.

Dated 3rd day of August 2020.

Mr A Mokoena

1. I have read the Decision written by Judge Ngoepe. I have also read Mr M Neethling's Decision in which Mr M Gendel concurs. For the reasons I set out

below as well as those given by Judge Ngoepe, I disagree with Mr Neethling; I agree with the Decision by Judge Ngoepe and its conclusion. I also agree with the Orders set out in paragraph 13 of his Decision.

2. According to the AAC, the Directorate correctly found that *“various aspects of packaging which may individually be considered merely descriptive or unprotectable, when combined in a particular or unique way can become protectable advertising concepts, and in certain circumstances and as a whole these can acquire advertising goodwill. If this were not the case, then distinctive packaging, which is almost always made up of separate non-distinctive elements, would never be protectable as advertising.”* I agree with this view.
3. The Directorate further found that *“when the Advertiser’s products in the current matter were launched, or if the Advertiser had just launched its current packaging now, there may well have been valid grounds for a complaint and investigation in terms of Clause 8 and 9 of the Section II. However, the Complainant chose not to do so at the time. The Directorate does not believe that the Code can be used to protect a brand against a competitor that has been allowed 9 years to establish itself in the market place, before taking issue, unless that competitor has made a significant and/or inexplicable change.”* The Directorate concluded that *“the changes are not significant enough to warrant a finding that clauses 8 and 9 have been breached.”*
4. The Directorate accepts that Colgate may well have had valid grounds to complain that Bliss Brands had breached Clauses 8 and 9 when it launched Securex in 2011 but found that Colgate could not be allowed to bring such a complaint in 2019. In other words Colgate has missed the boat. The AAC disagreed with this finding. The AAC found that the mere reason that Colgate waited 8 years to bring this complaint does not nullify their right to seek recourse for a possible infringement of Clauses 8 and 9 of the Code. According to the AAC, Securex as a late entrant in the germ protection soap category, entered that category not as an innovative challenger or disruptor brand with new ideas but rather elected to align its packaging design to that of Protex the category leader, in order to *“claim a share of the market.”* I fully agree with the AAC’s view.

5. Every product category has leaders (pioneers or trailblazers) and followers. The category leader establishes the category, gives it its identity and character by “*labelling*” it. In this case the label given to the category is “germ protection soap category”. The actions, strategies and tactics of the pioneer brand create category norms and conventions. These could include the types of emotional and functional claims made in the category, the packaging design used, packaging type, pack sizes, the introduction of sub-brands as well as product variants or line extensions which make up brand architecture, advertising style, pricing strategies and promotion strategies, amongst others. If the pioneer succeeds in capturing a lion’s share of the market, their strategies become the winning formula of the category or as some call it, the secret sauce. This secret sauce is made up of individual ingredients which, as stand alone elements, are not capable of protection by the code. Once the various ingredients are mixed to form a distinctive recipe which results in a successful secret sauce, this secret sauce enjoys protection both by Intellectual Property Law as well as the Code. In other words, the combination of the various design elements of the Protex packaging design have resulted in a distinctive, established and well-known get-up that enjoys protection by the Code. The Directorate shares this view.
6. It is customary for competitors in a category to subscribe to category norms provided. It is however important that in aligning your marketing choices with these category norms you do not exploit other people’s advertising goodwill or imitate their creative ideas. It is common practice for late competitors to emulate, be inspired by, learn from, copy with modifications or in some cases chose to replicate this winning formula. Some new competitors or new entrants elect to challenge or disrupt the category by introducing radical innovation that challenges category norms and even redefine the category. Examples of disruptive technology includes, amongst others, how Colgate disrupted the aerosol and roll-on deodorant market by introducing a deodorant stick, how contact lenses disrupted the spectacles market, how e-commerce disrupted the bricks and mortar retail market, how cellphones disrupted landline telephones, how smart phones with cameras that disrupted the camera industry, how digital music downloads apps like iTunes and Spotify disrupted the compact disc market, how e-hailing services like Uber and Taxify disrupted the car and taxi

industry, how Red Bull disrupted the energy drink market by changing the taste, product formulation of energy drinks as well as introducing slimline cans to compete with the customary Polyethelene (PET) bottles.

7. In this case Bliss Brands, in introducing Securex, a competitor to Protex, was inspired by Protex's secret sauce on a number of levels. This inspiration, instead of resulting in a healthy, competitive visual distance (visual differentiation) between Protex and Securex actually had the opposite effect. Instead of taking a spoonful of inspiration from Protex's packaging design, Securex opted to take a spade full of inspiration. This has resulted in a significant reduction of the perceptual distance between the two brands' design architecture. Consumers can be forgiven for getting confused between the two brands when standing in front of a supermarket shelf. It is no wonder that some consumers took to the Advertiser's Instagram to suggest, albeit sarcastically, that Securex looks like a cheaper version of Protex. This to me suggests that the average consumer has noticed the striking similarity in the Securex and Protex design architecture.
8. The inspiration that Securex drew from Protex can be explained in a tale of three chapters. The first chapter relates to the naming convention of adding the suffix "ex" to the word "Secure" to make Securex, just as Colgate had added the suffix "ex" to the word Protect to make Protex. This in itself is not a breach of Clauses 8 and 9, and that is why Bliss was able to register this mark.
9. The second chapter relates to the line extensions (variants) adopted by Bliss Brands. Just like Protex, Bliss decided to launch 4 variants. This in itself does not trigger a breach of Clauses 8 and 9.
10. The third chapter relates to the concession made by the Advertiser in its packaging design brief that in the absence of superior product efficacy claims, the only lever they could pull in competing directly with Protex was a packaging design upgrade. One of the hallmarks of the Protex packaging design is the predominant use of the white colour to cue both protection from germs as well as a premium look and feel, and the limited use of bright colours to differentiate between product variants. It is often said in Marketing circles that the use of the colour white in packaging advertising cues a premium positioning. This is because the colour white, being plain and blank, is regarded as "*expensive real*

estate.” Despite being substantially cheaper than Protex, Securex decided on the predominant use of the “*premium*” colour white, presumably in an attempt to establish premium credentials in the consumer’s eyes. Securex retails at a lower price point than Protex however has acquired the same premium look that Protex is known for, and in my view this is why consumers would refer to Securex as a cheaper version of Protex. Securex went further and copied the exact same colours as Protex for its variants (Pink, Green, Blue and Orange) and in some instances used the same variant descriptors as Protex (e.g. Herbal and Fresh), further reducing the perceptual distance between the two brands. The specific combination of all these design elements has resulted in a distinctive look for Protex that is well established in the market. Protex is a market leader in the germ protection soap category and as a result it enjoys eye level positioning on supermarket shelves. Research conducted by Colgate proves that Protex’s packaging design is instantly recognizable by consumers. This in my mind proves that Protex packaging architecture enjoys a reputation in the market. When viewed together, Protex’s packaging design elements warrant protection by the Code. Securex, in substantially reducing the perceptual differentiation between itself and Protex through a pack design upgrade, has not only exploited Protex’s advertising goodwill as per Clause 8, but has also imitated Protex, an act which is prohibited by Clause 9 of the Code.

11. In dealing with Clause 8 of the Code the AAC correctly found that *“in our view, the 2018 changes to the Securex packaging moved the packaging even closer to the Protex packaging than before. Colgate makes the point that none of the other soaps in the germ protection soap category are packaged in a manner that resembles the Protex packaging. We agree.”* The AAC went further to say *“the Securex packaging, in moving even closer to the Protex packaging, is in our view taking advantage of the advertising goodwill relating to the Protex brand. The overall similarity between the two is so close that there is a real likelihood of confusion, deception and the diminution of advertising goodwill. Indeed, Colgate has produced evidence of actual confusion, from the Bliss Instagram page for Securex, where one consumer asks whether Securex is Protex, and another asks whether Securex is the cheaper version of Protex. In our view, therefore, the Securex packaging constitutes a breach of clause 8 of Section II of the Code.”*

12. In terms of Clause 9, the AAC had this to say, *“in addition, we are of the view that Bliss is a serial imitator, in breach of Clause 9 of Section II of the Code. Previously, Bliss breached Clause 9 by imitating the look and feel of Sta-soft. In this instance, we find that Bliss has copied the Protex packaging in a manner that is recognizable and that clearly evokes the existing Protex concept. Clearly, this may result in the likely loss of potential advertising value for Colgate.”* I agree with this view. The majority of South African consumers have a low level of literacy; they run the risk of getting confused when presented with two brands in the germ protection soap category that look this similar. The cheaper brand, Securex stands to gain at the expense of the expensive brand Protex. Allured by Securex’s recently acquired premium looking get up and seduced by Securex’s substantially lower price, an unsuspecting, unsophisticated consumer runs the risk of mistakenly buying Securex when they in fact intend to buy Protex. Because of their limited means, low income consumers can ill-afford to make the wrong purchase and therefore rely on brands’ bona fides and ingenuity to limit any confusion. Clauses 8 and 9 of the Code are the last line of defence for these consumers, and must therefore be invoked.
13. In terms of the remedy, the AAC had this to say *“Bliss requests, in the event of the appeal being upheld, that it be afforded a period of six months to withdraw the Securex packaging. In our view, the three month period stipulated in Clause 15.3.6 is a period that is seen as reasonable in the advertising industry. To double that period would be to undermine it. There must be sound reasons for extending the period, let alone doubling it. Bliss does not say why it cannot fast track either the design period or the printing and delivery period, or both. In any event, Bliss will not be required to remove and replace the product that is already on shelf. It is only the replacement product that will have to be repackaged. We do not accept that a case has been made out for an extension of the three-month period in Clause 15.3.6 of the Procedural Guide.”* I agree with this finding. The costs or inconvenience attendant to complying with the Code is not sufficient grounds for extending the compliance period. A view to the contrary would open the proverbial stable doors in a way that renders the Code toothless. Surely that could not have been the wish of the drafters of this Code.

Mr M Neethling

1. I disagree with the Decisions of Judge Ngoepe and Mr Mokoena as well as the Orders made.
2. The Directorate dismissed Colgate's appeal against Bliss, for the breach of clauses 8 and 9 of the Code of Advertising Practice. At issue was the ostensible similarity between Securex, a small 2% share brand against Protex, the dominant market leader brand at 32% share. Protex argued that their packaging architecture was protected IP, and that the recent change that Securex had completed brought it closer to Protex to the extent that it was now an issue.
3. Colgate appealed this ruling, and the AAC upheld this appeal and ruled that Bliss indeed took '*advantage of advertising goodwill relating to the Protex brand*'. They argued that there '*was a real likelihood of confusion, deception and the diminution of advertising goodwill*'.
4. They also found that Bliss '*copied the Protex packaging in a manner that is recognisable and that clearly evokes the existing Protex concept*'.
5. It is the view of the Final Appeals Committee (FAC) that in its upholding of Colgate's appeal, the AAC erred in certain crucial respect, and that rather, the Directorate was substantially correct in its ruling.
6. The FAC does not believe that the Directorate's contention that the time lapse between the launch of Securex and Colgate's complaint is sufficient reason to dismiss it, or that the complaint needs to be considered only in relation to the change effected by Bliss in its 2018 packaging update, but rather that it should consider the Securex branding holistically.
7. In doing so the FAC found the following to be problematic with the AAC's decision.
8. The AAC advanced ideas of a 'proper' approach when considering the behaviour of a 'challenger' brand. It in so doing categorises Securex as a challenger brand. The appropriate conduct deemed proper includes a challenger brand:

- a. Doing *'bold work, usually against existing conventions...to break through and be recognised by customers'*;
 - b. *'Able to pioneer a category and invest ahead of the curve....to distinguish themselves from established category convention'*;
 - c. Building *'solid brand equity through intensive marketing campaigns'*.
9. This stereotyping of proper behaviour of challenger brands is in the view of the FAC, overly simplistic. There is simply no proper way to commercially challenge a strong and embedded player in a fiercely contested market. In any event it may be better to describe Securex as a 'follower' brand rather than a challenger brand.
 10. A workable definition of such a company may be *"A company that allows other more dominant firms to lead the way within the marketplace that it does business in. For example, a smaller business that is a market follower might keep close tabs on the activities at major market leader firms and seek to copy or improve upon the leader's product releases and marketing efforts"*¹.
 11. The motive implied in the AAC ruling is that Securex wanted to *'claim market share'* from Protex. This is patently obvious, the very *raison d'être* of competition. In doing so it appears that Securex rely primarily on their trademark Securex, and the material discount at which they price themselves compared to Protex.
 12. In respect of the trademark, it is notable that no complaint has been lodged to challenge the mark. It is accepted then that the brand name Securex in and of itself is not an issue.
 13. The research that Colgate advanced, along with expert testimony, regarding confusion amongst consumers is deeply problematic, and cannot be relied on to bolster their confusion contention. This is because the visual prompts used retained the suffix 'ex' in both cases. This is sure to trigger recall to one or either of the brands in question, and comes as no surprise. That the majority of people recalled 'Protex' regardless of which 'ex' treatment they were exposed to, is

¹ <http://www.businessdictionary.com/definition/market-follower.html> [accessed 24/7/2020]

entirely consistent with Protex's dominant market leader position at 32%. Such dominance will almost certainly mean that far more consumers in a market segment know it or are aware of it, even if they don't use it. It is for this reason that routinely, the advertising of smaller brands will be assumed to come from the market leader, in ad recall testing. The presence of 'double –jeopardy²' in this case renders the results of this survey unhelpful.

14. The fact that Securex also sells at a 30% discount is not an immaterial point. In a highly contested market, where the pursuit of value has heightened over time, and the challenge of affordability deepened due to macro-economic variables, the relative price of a brand one to the other is fundamental. Price is a very strong cue to quality and other attributes. The price gap between the two brands almost certainly if not eliminates then certainly reduces possible confusion.
15. The AAC accepted Colgate's claim that its Protex packaging architecture had certain features, and that when taken together constituted a 'unique packaging architecture'. The FAC does not share this conviction with a high degree of certainty.
16. Specifically the argument that was accepted by AAC was that the Securex redesign 'brought it closer' to Protex, will little supporting evidence of why this might be so. 'Closer' is by no means a verified fact in this case.
17. Bliss contended that their pack design changes in 2018 were a logical evolution, and this may well be so. In any event the pre and post 2018 designs do not materially alter the FAC's view.
18. The matter of the specific components of the design were neatly unpacked by the Directorate in the initial ruling in any event.
 - a. The location of brand name, the colour used, its aural pronunciation and so on were unchanged between the two generations of design;

² [https://en.wikipedia.org/wiki/Double_jeopardy_\(marketing\)](https://en.wikipedia.org/wiki/Double_jeopardy_(marketing)) [accessed 24 July 2020]

- b. The scenery and other elements of the design remained substantially intact, except for the orange variant and the introduction of the ball device, which served to further differentiate, not bring together;
 - c. The change of variant names applied to all four variants, but only “Herbal’ and “Fresh’ were then exactly the same as Protex.
 - i. However, Herbal was already used by Securex before the change, and is also used by Lifebuoy, Savlon, Dettol and Germex.
 - ii. Fresh is also used by Lifebuoy, and Savlon, and Dettol uses ‘Profresh’.
 - d. The colour changes, resulting in a ‘cleaner’ more modern look, which interestingly Colgate didn’t complain about.
19. It was also not the case that the complainant in front of the Directorate claimed exclusivity in respect of any of the individual elements, so the minutiae of the designs seems moot.
20. The issue is the get-up as a whole, and given that unique design features are few and far between, the design rely heavily on their name. As stated, Colgate have not challenged the Securex trademark, so the aural similarity derived from the ‘ex’ suffix is then also moot.
21. The ACC made constant reference to MAQ Soft and Sta-soft matter, but it is not clear why this might be relevant in the matter. The cases bear no similarity to each other.
22. The AAC also made reference to Bliss as a ‘serial imitator’, which is, in the view of the FAC, unhelpful.
23. The evidence advanced by Colgate of ‘*real likelihood of confusion*’ is supported it appears only by reference to two Instagram posts, and this cannot be sufficient. The validity or authenticity of these two posts were correctly challenged by Bliss, given that the nature of social media platforms is such that anyone with mischievous intent can do as they wish, unedited. The FAC in no way suggests

that the Colgate itself authorised those posts, but it is entirely plausible that anyone within the broader ecosystem around Colgate, including ad agencies, packaging designers and suppliers, PR companies, family members, could have made these posts.

24. For these reasons advanced collectively above, the FAC believes that the Directorate were correct to dismiss the complaint. There is a high degree of sameness in the packaging designs within the category, trademark itself is not in dispute so the 'ex' argument, can't be relied on, the survey which supported Colgate's case is problematic, the brands occupy entirely different price points on shelf, and Colgate itself concedes that it can't monopolise any one specific element.

25. I would uphold the appeal and confirm the Directorate's Ruling

Dated 3rd day of August 2020

Mr M Gendel

I concur in the Decision of Mr Neethling.

Dated 3rd day of August 2020

For the Appellant

Adv F Southwood

Instructed by:

Eversheds Sutherland (SA) Inc

Sandton

Johannesburg

For the Respondent

Adv R Michau SC

Adv H Harilal

Instructed by:

Kisch Inc

Johannesburg