

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No 2230948
BY THE LITTLE BIG FOOD COMPANY LIMITED
TO REGISTER THE TRADE MARKS:
THE LITTLE BIG FOOD COMPANY
and others
IN CLASSES 29, 30 AND 31**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER No 52315
BY DAILYCER LIMITED
BASED UPON THE EARLIER TRADE MARK:
THE BIG CEREAL COMPANY**

TRADE MARKS ACT 1994
IN THE MATTER OF Application No 2230948
by The Little Big Food Company Limited
to register the following trade marks as a series of four:
THE LITTLE BIG FOOD COMPANY
THE LITTLE BIG FOOD CO.
LITTLE BIG FOOD COMPANY
LITTLE BIG FOOD CO.
and
IN THE MATTER OF Opposition thereto under No 52315
by Dailycer Limited

Background

1) On 28 April 2000 ?What If! applied to register the above trade marks as a series of four. The application was published with the following specification:

meat, fish, poultry and game; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats; prepared meals; snack foods; prepared meals or snacks, made wholly or principally from the aforesaid goods

coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery; ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); cakes; custard; pasta; pies; meat pies; pizzas; puddings; rice; spaghetti; spices; prepared meals; snack foods; prepared meals or snacks, made wholly or principally from the aforesaid goods; but not including bread

fresh fruits, vegetables and herbs

The goods are in classes 29, 30 and 31 respectively of the International Classification of Goods and Services. The application was published on 3 January 2001 and currently stands in the name of The Little Big Food Company Limited.

2) On 30 March 2001 Dailycer Limited filed a notice of opposition to this application.

3) The opponent states that he is the proprietor of the United Kingdom trade mark registration no 2214627 of the trade mark **THE BIG CEREAL COMPANY**. This trade mark is registered in respect of the following goods:

snack food and food products; snack food and food products comprising one or more of potatoes, fruit, meat, vegetables, eggs, jellies, jams, milk and milk products

snack food and food products; snack food and food products comprising one or more of cereals and cereal products, chocolate, fruits, grains, nuts, maize, potato flour, rice and rice products, rusk, soya, bread, confectionery, pasta, corn, wheat, museli

The goods are in classes 29 and 30 respectively of the International Classification of Goods and Services.

4) The opponent states that the respective trade marks are similar and encompass identical or similar goods and, therefore, there is a likelihood of confusion. Consequently, registration of the trade mark in suit would be contrary to section 5(2)(b) of the Act.

5) The applicant filed a counterstatement in which the ground of opposition was denied.

6) Both parties filed evidence and seek an award of costs. After the completion of the evidence rounds I advised the parties that I believed a decision could be made without a hearing. However, the parties were advised that they retained their right to a hearing. Neither party requested a hearing so I will make a decision after a careful study of the papers.

Opponent's evidence

7) This consists of a witness statement by Nicholas Womsley. Mr Womsley is a trade mark attorney. Mr Womsley exhibits at NW2 a search that was carried out in respect of trade marks in classes 29, 30 and 32 which include both the word 'little' and the word 'company' (or its abbreviated form 'co'). He also exhibits at NW2 a search carried out in respect of trade marks which include the word 'big' and the word 'company' (or 'co'). Mr Womsley states that the searches found that the only trade marks including the aforesaid terms as prominent features either belonged to the opponent, were filed by the applicant in respect of the application in suit or were trade marks which had been withdrawn, lapsed or otherwise abandoned. In fact the results show a Community trade mark application for the trade mark THE LITTLE BIG FOOD COMPANY. It is shown as having been advertised and is in the name of the applicant. Mr Womsley states that these results show that, as far as trade marks on the register are concerned, that the trade mark of the opponent can be considered at least conceptually unique and distinctive and that the applicant's adoption of a trade mark that is at last conceptually similar could be a cause of confusion to the average consumer.

Applicant's evidence

8) This consists of a witness statement by Alistair Robertson Gay. Mr Gay is a trade mark attorney. Mr Gay states that the trade mark of the opponent is a weak mark. He exhibits at ARG1 details of a United Kingdom trade mark registration for the trade mark THE BIG BUS COMPANY and device in classes 16, 25 and 39. Mr Gay states that it will be noted that the registration was accepted on the basis that the trade mark had acquired a distinctive character by virtue of use. He states that this demonstrates that the registrar has considered the words THE, BIG and COMPANY, when combined with a word and device element that is non-distinctive in respect of the goods or services, to be inherently non-distinctive. He states that in the context of this case the word CEREAL is as non-distinctive as the word BUS in respect of bus transport services.

9) Mr Gay states that in view of the weak nature of the opponent's trade mark, the non-distinctive elements that it shares with the trade mark in suit and the fact that the respective trade marks are distinguishable, confusion will not occur.

10) Mr Gay states that the searches exhibited by Mr Womsley do nothing to demonstrate that there exists a likelihood of confusion on the part of the public. Mr Gay states that the opponent has not submitted any evidence to suggest that the respective trade marks are conceptually similar.

Decision

Likelihood of confusion

11) Section 5(2)(b) of the Trade Marks Act 1994 states that a trade mark shall not be registered if because:

“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) Section 6(1)(a) of the Act defines an earlier trade mark as:

“a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks”

13) The trade mark upon which the opponent relies falls within the parameters of section 6(1)(a) and is, therefore, an earlier trade mark.

14) In determining the question under section 5(2), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR 77 and *Marca Mode CV v Adidas AG* [2000] ETMR 723. It is clear from these cases that:-

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG* page 224;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG* page 224, 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; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* page 84, paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG* page 224;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing

in mind their distinctive and dominant components; *Sabel BV v Puma AG* page 224;

- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* page 132, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG* page 224.

Comparison of goods

15) The goods encompassed by the respective trade marks are as follows:

Earlier registration	Application in suit
<p><i>snack food and food products; snack food and food products comprising one or more of potatoes, fruit, meat, vegetables, eggs, jellies, jams, milk and milk products – class 29</i></p> <p><i>snack food and food products; snack food and food products comprising one or more of cereals and cereal products, chocolate, fruits, grains, nuts, maize, potato flour, rice and rice products, rusk, soya, bread, confectionery, pasta, corn, wheat, muesli – class 30</i></p>	<p><i>meat, fish, poultry and game; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats; prepared meals; snack foods; prepared meals or snacks, made wholly or principally from the aforesaid goods – class 29</i></p> <p><i>coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery; ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); cakes; custard; pasta; pies; meat pies; pizzas; puddings; rice; spaghetti; spices; prepared meals; snack foods; prepared meals or snacks, made wholly or principally from the aforesaid goods; but not including bread – class 30</i></p> <p><i>fresh fruits, vegetables and herbs – class 31</i></p>

16) The specification of the earlier registration includes the general term *food products* in both classes 29 and 30 and *milk*. The former term encompasses all food products in these classes and so must encompass foods of the application in suit in classes 29 and 30. I consider that all the goods of the application in suit in classes 29 and 30 can be described as food products with the exception of *milk, coffee, tea, cocoa* and *artificial coffee*. *Milk* is specifically included in the specification of the earlier registration. Consequently, I consider the goods of the application in suit in classes 29 and 30 to be identical to those of the earlier registration with the exception of *coffee, tea, cocoa* and *artificial coffee*.

17) The European Court of Justice held in *Canon*, in relation to the assessment of the similarity of goods and/or services, that the following factors, inter alia, should be taken into account: their nature, their end users and their method of use and whether they are in competition with each other or are complementary.

18) As I have decided that *coffee, tea, cocoa* and *artificial coffee* are not identical to the goods of the earlier registration I need to decide if they are similar. These goods all serve the primary purpose of making hot beverages; although I note that they can be used as flavourings in cooking. As beverages their purpose is not to satiate hunger, as with food products, but to slake the thirst. We all eat and drink. Consequently, in order to define end user it is necessary, in my view, to look to the purpose of the purchase. In one case the end user requires something to eat, in the other something to drink; consequently I do not consider that the end users are the same. In my experience *coffee, tea, cocoa* and *artificial coffee* are sold in specific and separate areas of shops; in supermarkets they have their own aisles or parts of aisles. There are also shops which are devoted to the sale of coffees and teas. I cannot see that *coffee, tea, cocoa* and *artificial coffee* are in competition with the goods of the earlier registration, one is not likely to substitute them for the goods of the opponent. Neither can I see that they have a mutually dependant or symbiotic relationship with the goods of the opponent. Therefore, I do not consider them to be complementary. Taking all the above factors into account I do not consider that *coffee, tea, cocoa* and *artificial coffee* are either identical or similar to the goods of the earlier registration.

19) I turn now to the goods in class 31 of the application in suit. All the goods are for eating. However, this would cover all foodstuffs. Just because ice cream and salmon are for eating does not lead to them being similar goods. The earlier registration includes vegetable and fruit food products and so encompasses fruits and vegetables that have undergone some form of processing e.g. freezing and canning. Are processed fruits and vegetables similar to those in their natural state? Often consumers will consider whether they wish to purchase fresh fruits and vegetables or their frozen counterparts; eg one might purchase frozen cauliflower or raspberries instead of their fresh counterparts. The respective goods are, therefore, in competition. The end user is likely to be one and the same; the person who requires these products for the same purpose. His or her choice might simply rest on the availability of the fresh product. The respective goods share virtually everything in common in their natures, especially in relation to frozen and fresh products. Consequent upon the above, I consider that *fresh fruits* and *vegetables* of the application in suit are similar to the goods of the earlier registration.

20) I turn now to *fresh herbs* in class 31 of the application in suit. The all encompassing term *food products*, present in both classes 29 and 30 of the earlier registration, does I believe encompass processed herbs eg dried herbs. In relation to *fresh herbs* and processed herbs I consider that the same arguments apply as for *fresh fruits* and *vegetables* and their processed versions. Consequently, I believe that these *fresh herbs* are similar to the goods of the earlier registration.

21) In summary, I find that all of the goods of the application in suit are identical or similar to the goods of the earlier registration with the exception of coffee, tea, cocoa and artificial coffee.

Comparison of signs

22) The signs to be compared are:

Earlier registration

THE BIG CEREAL COMPANY

Trade marks in suit

**THE LITTLE BIG FOOD COMPANY
THE LITTLE BIG FOOD CO.
LITTLE BIG FOOD COMPANY
LITTLE BIG FOOD CO.**

23) For the sake of this comparison I will deal with the uppermost mark of the series. This is the closest to the earlier registration. If the opponent does not succeed in relation to this trade mark he will not succeed in relation to the other trade marks in the series.

24) The trade mark in suit contains the additional word LITTLE and the word FOOD rather than CEREAL. The presence of LITTLE next to BIG gives rise to an oxymoron. In comparing the respective trade marks I must consider them in their entirety, the public do not normally indulge in the analysis and dissection of trade marks, but do take into account the distinctive and dominant components. In the cases of both trade marks none of the individual elements are particularly distinctive. THE is simply the definite article, LITTLE and BIG are common and highly descriptive adjectives, FOOD and CEREAL describe the nature of the goods and COMPANY is one of the most common ones of indicating the nature of an undertaking. LITTLE BIG being an oxymoron is quite unusual. The opponent has claimed that the respective trade marks are conceptually similar. In one there is a specific type of food, CEREAL, in the other the general term FOOD. In one there is the simple use of the word BIG, in the other an oxymoron of LITTLE BIG. In the case of the former the trade mark indicates that the company is itself big. In the latter the FOOD is BIG but that the company is LITTLE. The claim to similarity by the opponent rests in his statement of grounds and witness statement very much upon this alleged conceptual similarity. I do not consider that the respective signs are conceptually similar. I also consider that the differences between the trade marks is such that they are neither phonetically nor visually similar. Even taking into account the imperfect recollection of a consumer and that he is unlikely to be directly comparing the trade marks, I do not consider that the trade marks can be considered to be similar.

25) I find, therefore, that the respective trade marks are not similar.

Conclusion

26) The opponent has relied upon state of the register evidence. In *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281 Jacob J stated:

¶ In particular the state of the register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led to the Registrar to put the marks concerned on the Register. It has long been held that under the old Act that comparison with other marks on the Register is in principle irrelevant when considering a particular mark tendered for registration, see *e.g. MADAME Trade Mark* (1966 RPC 541) and the same must be true of the 1994 Act. I disregard the state of the register evidence. @

The applicant has also relied upon state of the register evidence in relation to his claim that the trade mark of the opponent has little inherent distinctiveness. I ignore the state of the register evidence in relation to the claims of both parties. In relation to the distinctiveness of the earlier trade mark I rely upon the finding of the European Court of Justice in *Lloyd*:

“In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgement of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).”

27) The distinctiveness of the earlier trade mark needs to be considered as part of the global assessment of the likelihood of confusion. There is no evidence of use of the earlier trade mark and so it cannot lay claim to having improved its distinctiveness through use. The trade mark of the opponent, which has a presumption of validity, gives a clear allusion to the goods, cereal products. The other words in the trade mark in themselves have no great distinctiveness. As a whole the trade mark gives an idea of a large company that specialises in cereals. As such I consider that the trade mark of the opponent has a limited inherited distinctiveness. The natural corollary of the finding in *Sabel* that there is a greater likelihood of confusion where the earlier trade mark is particularly distinctive is that there is a lesser likelihood of confusion where the earlier trade mark is not particularly distinctive. In such cases the public will differentiate between trade marks by smaller differences. Millet LJ in *The European Limited v The Economist Newspaper Limited* [1998] FSR 283 stated:

“The more distinctive the earlier mark, the greater will be the likelihood of confusion. The converse, of course, follows. The more descriptive and the less distinctive the major feature of the mark, the less the likelihood of confusion.”

28) In considering the likelihood of confusion I take into account that the goods could be of very low cost, so there would not necessarily be a highly considered purchasing decision. I also bear in my the interdependency principle in relation to the proximity of goods or signs, many of the respective goods are identical.

29) In order for there to be a likelihood of confusion the respective trade marks have to be similar. Without similarity of signs there can be finding of a likelihood of confusion. This is what The European Court of Justice in *Sabel* held:

“In that connection, it is to be remembered that Article 4(1)(b) of the Directive is designed to apply only if, by reason of the identity or similarity both of the marks and of the goods or services which they designate, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

Mr Hobbs QC, sitting as the Appointed Person, also dealt with this matter in *Raleigh International* [2001] RPC 11:

"Similarities between marks cannot eliminate differences between goods or services; and similarities between goods or services cannot eliminate

differences between marks. So the purpose of the assessment under section 5(2) must be to determine the net effect of the given similarities and differences."

30) I find that there is not a likelihood of confusion.

31) The applicant having being successful he is entitled to a contribution towards his costs and I therefore order the opponent to pay him the sum of £700. 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 10th day of September 2002

**D.W.Landau
For the Registrar
the Comptroller-General**