

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 2422537 BY VRIJHEID UK LTD TO REGISTER THE TRADE MARK “LE TRAPPISTE” IN CLASS 43

AND IN THE MATTER OF OPPOSITION NO. 94745 THERETO BY INTERNATIONAL TRAPPIST ASSOCIATION

OPPONENT’S APPEAL TO AN APPOINTED PERSON FROM THE DECISION OF MR DAVID LANDAU DATED 2 FEBRUARY 2009

DECISION

Introduction

1. This is an appeal brought under section 76 of the Trade Marks Act 1994 (“**the Act**”) against a decision of the Registrar’s Hearing Officer, Mr David Landau, to reject an opposition against application no. 2422537 to register the trade mark “**LE TRAPPISTE**” in Class 43 in respect of the following services:

“Bar, restaurant, café, cafeteria, snack bar, public house, nightclub and catering services; preparation of food and drink.”

(“**the Mark**”)

2. The Mark was applied for by Vrijheid Ltd, the predecessor in title to Vrijheid UK Ltd (“**the Applicant**”), on 23 May 2006. The Applicant and its predecessor have been trading as a Belgian café bar in Altrincham, Cheshire under the name “Le Trappiste” since 2002.
3. The Opponent, International Trappist Association, is a Belgian based international not for profit association. It represents fourteen Trappist abbeys in Europe in respect of their traditional Trappist products (mainly beers and cheese). The abbeys manufacture their products pursuant to specific Trappist methods and procedures.
4. The Opponent filed an opposition to the entire application on 30 October 2006, raising objections under sections 5(2)(b), 5(3) and 5(4)(a) of the Act, relying on the earlier registration and use of the Community collective mark depicted below (“**the**

Logo”), as well as claimed passing off rights in relation to the Logo and the designation “TRAPPIST”.



5. Community collective marks are governed by articles 66 to 74 of Council Regulation (EC) No. 207/2009 on the Community trade mark (codified version) (“**the Regulation**”). A Community collective mark is a Community trade mark intended to distinguish the goods or services of the members of its proprietor, being an association of manufacturers, producers, suppliers or other traders, from those of other undertakings. An applicant for a Community collective mark must submit regulations governing its use to the Community trade mark office (OHIM). These regulations specify the persons authorised to use the mark, the conditions of membership of the association and any conditions of use. Subject to limited exceptions, Community collective marks are treated in identical fashion to other Community trade marks. In the context of this case, they may be relied on as earlier trade marks to support relative grounds for refusal of a later United Kingdom trade mark application.
6. The Applicant defended the opposition in full by Notice of defence and counterstatement filed on 8 February 2007. It required the Opponent to provide proof of use of the Logo in respect of beers in order to be permitted to pursue the grounds based on registration no. 887455.
7. Both parties filed evidence. A hearing took place on 7 January 2009, at which the Opponent was represented by Counsel, Mr Guy Tritton, instructed by Taylor Wessing. The Applicant was not represented, but relied instead on written submissions filed by its trade mark attorneys, Wilson Gunn.
8. The hearing officer dismissed the opposition on all three grounds in a written decision dated 2 February 2009 (O/031/09 – “**the Decision**”).
9. On 2 March 2009, the Opponent gave notice of appeal to an Appointed Person, seeking to reverse the hearing officer’s conclusions under each of the grounds of opposition. The hearing of the appeal took place before me on 22 July 2009, at which the Opponent was again represented by Mr Tritton, instructed by Taylor Wessing. The Applicant did not attend, was not represented, and filed no written submissions.

Approach to this Appeal

10. As the Opponent accepts, the role of the Appointed Person is to review the Decision, not to re-hear the case. I should show “a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle”: *REEF Trade Mark* [2002] EWCA Civ 763, [2003] RPC 5 at [28]. A decision does not contain an error of principle merely because it could have been better expressed.
11. I also bear in mind the observation of Daniel Alexander QC (sitting as a Deputy High Court Judge) in *Digipos Store Solutions Group Ltd v Digi International Inc.* [2008] EWHC 3371 (Ch) at [6] that:

In the context of appeals from the Registrar relating to section 5(2)(b) of the Act, alleged errors that consist of wrongly assessing similarities between marks, attributing too much or too little discernment to the average consumer or giving too much or too little weight to certain factors in the multi-factorial global assessment are not errors of principle warranting interference.

Statutory provisions

12. The relevant parts of section 5 of the Act provide as follows:

- (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 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.
- (3) A trade mark which is identical with or similar to an earlier trade mark shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.
- (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.

13. These provisions reflect various parts of Article 4 of First Council Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States

relating to trade marks (codified version) (“**the Directive**”). Parallel provisions in relation to Community trade marks are found in article 8 of the Regulation.

Grounds of Opposition

14. In outline, the grounds of opposition, all of which the Opponent seeks to pursue in this appeal, were as follows:

(1) Section 5(2)(b):

The Logo is registered as a Community collective mark no. 887455, with a filing date of 24 July 1998, in Class 32 in respect of *inter alia* “beers” and has been used in respect of beers during the five years prior to the date of publication of the Mark (as required by the proof of use requirement under rule 13(C) of the Trade Marks Rules 2000, which were in force at the relevant time).

The Logo is also registered as a Community collective mark no. 2922649, with a filing date of 6 November 2002, in respect of the following goods:

Class 3: bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices;

Class 30: 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); spices; ice;

Class 33: alcoholic beverages (except beers).

The proof of use requirement does not apply to this registration, as the registration process was completed on 12 May 2004.

Because of the similarities between the Logo and the Mark, and the similarities between the goods for which the Logo is registered (limited to “beers” in the case of registration no. 887455) and those covered by the application for the Mark, there is a likelihood of confusion on the part of the public.

(2) Section 5(3):

In respect of registration no. 887455, the Logo is well-known in relation to beers. Its distinctiveness, singularity and exclusivity will be eroded by use of the Mark.

(3) Section 5(4)(a):

The sign TRAPPIST has been used in the United Kingdom on beers since 1 January 1970. The Logo has been used in the United Kingdom on beers since 20 June 2000. Such prior use of these designations means that the Opponent may

prevent the use of the Mark in the United Kingdom by virtue of the law of passing off.

The Decision

15. The Hearing Officer set out the background to the opposition and summarised the grounds relied on. He then described the parties' evidence in some detail. In the absence of any criticism of this review, I do not propose to repeat the exercise, save for the following summary to set the scene.
16. The Opponent's evidence comprised two witness statements made by the President of the Opponent, Mr Jan M Van Gool. These give some background information about the Opponent and its supervision of the various Trappist monasteries that produce beer. Mr Van Gool explains that the Logo may only be used on beers that comply with specific requirements laid down as to *inter alia* production methods (in accordance with the "authentic Trappist method and its religious origins"), the need for a direct link with an accredited monastery or related business, and the requirement that the proceeds are not directly for profit, but must go towards the maintenance of the accredited monastery or other good causes.
17. Mr Van Gool states that only seven beers so far comply with these requirements and have been authorised to bear the Logo. The rest of his evidence is aimed at supporting the claims of use, distinctiveness and reputation of the Logo and includes information about sales in the United Kingdom of beers bearing the Logo, publications and press articles that refer to Trappist beers. This is summarised in some detail at paragraphs 17 to 22 of the Decision.
18. Mr Van Gool states in his concluding paragraph his belief that "the mark 'Authentic Trappist Product' is well known to the general public and to buyers and suppliers of beers in the United Kingdom, and is uniquely associated with the [Opponent] and its members". He also asserts that "Trappist beers are widely known as Belgian specialty beers in the United Kingdom".
19. The director and sole owner of the Applicant, Mr Martin B Matthews, gives evidence about the Applicant's Belgian café bar, explaining that it stocks and sells over 100 different Belgian beers, including beers from five of the six Trappist brewing monasteries in Belgium and the one Trappist brewing monastery outside Belgium, in Holland. The adoption of the name LE TRAPPISTE for the bar is intended to evoke "things Belgian" in the minds of beer drinkers.
20. Mr Matthews' evidence is supported by a witness statement from the Applicant's trade mark attorney, Mr Terry Rundle. He exhibits photographs of bottles of Trappist beers showing how the Logo and sometimes the word TRAPPIST appears on their labelling, always in addition to and smaller than the primary beer name.

21. Paragraphs 29 to 37 of the Decision deal with the question of whether the Opponent had satisfied the proof of use requirement in respect of “beers” for registration no. 887455 under rule 13(C) of the Trade Marks Rules 2000. The hearing officer concluded that it had done so. There is no challenge to this conclusion.
22. The hearing officer then dealt with the three grounds of opposition in turn, finding in favour of the Applicant in each case. I propose to take each ground in turn, setting out the relevant reasoning and conclusions of the hearing officer and then considering the appeal grounds in each case.

Section 5(2)(b)

23. The hearing officer started his analysis of the section 5(2)(b) ground of opposition by considering the identity and characteristics of the average relevant consumer and the nature of the purchasing decision, as necessary precursors to considering the likelihood of confusion. He said:

38) *Beers and alcoholic beverages* of the collective mark specifications are bought by the public at large who are over eighteen years of age. The other goods of registration no 2922649 are all bought by the public at large. Certain of the class 33 and class 3 goods, and *beers*, could be of high value and involve a careful and educated purchasing decision, however, they could equally be of low value and the result of an impulse or casual purchase. The services of the application will be used by all, although certain of them might be governed by age limits eg *public house services*. The nature of the services are such that they could be purchased very much on the spur of the moment, eg popping into a public house. In considering the likelihood of confusion I must take into account the lowest common denominator that could lead to confusion in relation to the goods and services, eg the impulse purchaser. Viewing the matter from the perspective of the lowest common denominator, the nature of the purchasing process is such that it increases the potential effects of imperfect recollection. (This is not to gainsay that the average consumer is reasonably circumspect and observant.)

24. The hearing officer dealt with the comparison of the Logo against the Mark as follows (excluding footnotes):

40) 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, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. Consequently, I must not indulge in an artificial dissection of the trade marks, although I need to take into account any distinctive and dominant components. The average consumer 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 he/she is deemed to be reasonably well informed and reasonably circumspect and observant. The assessment of the similarity of the marks must be made by reference to the perception of the relevant public.

41) In the collective mark the words ‘authentic’ and ‘product’ clearly have a highly descriptive nature. The two toned hexagon device will not dominate the perception of a consumer. The word TRAPPIST is the largest word element in the trade mark. TRAPPIST is the dominant component of the collective mark. The French, singular

male definite article of Vrijheid's mark is in terms of size the smallest part of the mark; it will also be seen as a French form of the definite article. TRAPPISTE is the dominant component of Vrijheid's mark. (However, LE does have a noticeable perceptual effect as it makes the mark appear to be French, despite the vast majority of the average, relevant customers having no idea that trappiste is the French for a Trappist monk. At the same time the average, relevant consumer will inevitably conflate Trappiste with Trappist.) The presence of the e at the end of TRAPPISTE will at the most have a marginal effect on the phonetic and visual similarities of the dominant components of the respective marks. One at all times has to consider the marks in their entirety, this requirement has particular significance in this case. The mark of Vrijheid evokes France as well as a religious order; the conceptual significance of the average, relevant consumer will be born of this combined perception. The collective mark clearly identifies a particular and authentic product, it will lead the average, relevant consumer to expect a product. The TRAPPIST element will have the conceptual association of a religious order. There is no French connotation attached to the collective mark. As a whole the word elements of the collective mark will have the conceptual association of a genuine product that relates to a particular religious order. (My considerations re the conceptual associations of TRAPPIST and TRAPPISTE are predicated upon the basis that the average, relevant consumer will be aware that this describes a religious order. I take this as a notorious fact; the Trappists are, I believe, well-known owing to the generally held perception that they have taken vows of silence, whether that is in fact the case I have no idea.) In considering the overall visual similarity between the marks I have to take into account all elements of the marks; an element cannot be discarded from the consideration because of its limited distinctiveness. In this case the hexagon device is completely alien to the mark of Vrijheid as are the words AUTHENTIC and PRODUCT; LE is totally alien to the collective mark. Overall the marks give rise to quite different visual impressions; despite the similarities of the TRAPPIST/TRAPPISTE elements, which elements are also phonetically similar.

25. He then conducted a detailed comparison of the goods and services applied for in respect of the Mark and the goods relied on in relation to the earlier registrations. This comparison is not specifically criticised by the Opponent and so I turn straight to his summing up at paragraph 51, as follows:

51) Beers and alcoholic beverages are similar to bar, café and public house services, nightclub services and preparation of drink. There is a very low degree of similarity between beers and alcoholic beverages and restaurant, cafeteria and catering services. Snack bar services and preparation of food are not similar to the goods of the earlier registration.

26. Moving on to the final question of the likelihood of confusion, the hearing officer stated the following:

52) In considering whether there is a likelihood of confusion various factors have to be taken into account. There is the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa. Certain of the services are not similar to the goods of the earlier registrations, consequently, there can be no likelihood of confusion. Certain of the services are similar to the goods of the earlier registration to a very low degree. Certain of the services enjoy a reasonable degree of similarity with the goods of the earlier registration.

53) It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark the greater the likelihood of confusion. The distinctive character of a trade mark can be appraised only, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods 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. In relation to section 5(3) of the Act (see below) I find that ITA has not established an enhanced reputation in relation to its collective mark. Mr Tritton argued that the Trappist element of ITA's trade mark was distinctive in the same way that Coca-Cola is distinctive. Coca-Cola is a brand, a trade mark, that is its essence, outwith the carbonated beverage it does not have a meaning; it is also, perhaps, the most famous brand in the world. Trappist is not primarily a brand, in the context of this case it is not a trade mark but a collective mark. The essence of the word Trappist is that it describes a religious order, not a brand for a product. I cannot see that Mr Tritton's analogy holds good. In considering Trappist and its distinctiveness in relation to the goods for which it is registered it is necessary to consider the collective mark as a whole. In considering likelihood of confusion one is considering the perception of the average, relevant consumer so one is looking at the sense of the collective mark rather than its meaning. In this case I consider that the sense and the meaning are one and the same. The collective mark of ITA tells the average, relevant consumer that the product has the characteristic or quality of being genuinely made by Trappists or coming from a Trappist monastery. If Trappist had transcended into a brand rather than a religious order this could add to distinctiveness. However, as it is, I consider that for the average, relevant consumer the collective mark will describe a characteristic or quality and so have a very low degree of inherent distinctiveness, a low degree that is not improved by the use that has been shown.

54) Mr Tritton referred to the tradition of tied public houses in the United Kingdom. I consider that this is a notorious fact; despite this being less the case nowadays; various brewers having been made to dispose of their estates or part of their estates by competition authorities. This is a factor that must be given some weight in relation to *bar* and *public house services*; I do not consider that it is a relevant factor in relation to the other services.

55) As decided above, the nature of the purchasing decision means that the possibilities of the effects of imperfect recollection are increased.

27. He went on to cite extracts from relevant European Court decisions: *OHIM v Shaker di L Laudato & C Sas*, Case C-334/05 P, [2007] ECR I-4259; *Mülhens GmbH & Co. KG v OHIM*, Case C-206/04 P, [2006] ECR I-2717; and *Simonds Farsons Cisk plc v OHIM*, Case T-3/04, [2005] ECR II-4837.

28. The hearing officer concluded as follows:

59) Although one might be recommended a bar, public house etc, one is going to look at the signage and take cognisance of it before entering. The signage of licensed premises is one of the oldest traditional uses of a trade mark in the United Kingdom. The goods and services are both primarily chosen and distinguished by the eye and so visual similarity, of (sic.) lack thereof, is a key issue.

60) The collective mark shouts that it relates to a product, a very particular product with the characteristic/quality of having been produced by Trappists. It tells the average, relevant consumer that it is a product, not a service. It leaves the average, relevant consumer in no doubt as to this message it sends. Vrijheid's trade mark tells the average, relevant consumer that this is something French and something relating to Trappists. It does not speak of a product, it does not speak of a characteristic or quality. Despite the Trappist link it has a sense that is different to the collective mark.

61) Having weighed up all the factors, and taking into account ITA's best position of *beer* against *public house services*, I have come to the conclusion that the average relevant consumer would not believe that the services of Vrijheid and the goods of ITA come from the same source or from an economically linked source or that Vrijheid was part of ITA. (Of course, the average, relevant consumer is most unlikely to know that ITA's mark is a collective mark or what a collective mark is.) **There is not a likelihood of confusion and the grounds of opposition under section 5(2)(b) of the Act are dismissed.**

29. Mr Tritton summarised the grounds of appeal in relation to section 5(2)(b) as follows:

- (1) The hearing officer erred in his approach to determining the similarity of the marks.
- (2) The hearing officer erred in principle in finding that the Opponent's mark had a very low degree of distinctiveness.
- (3) The hearing officer failed to adopt a structured approach to the issue of likelihood of confusion.

Ground (1): Similarity of marks

30. The essence of the Opponent's first ground of appeal is that the hearing officer failed to give any weight to the dominant part of the two marks, being TRAPPIST in the case of the Logo and TRAPPISTE in the case of the Mark. Mr Tritton submitted that the hearing officer's approach was plainly contradictory, since he made findings that the word TRAPPIST was "the dominant component" of the Logo and that TRAPPISTE was "the dominant component" of the Mark, but then – despite finding visual and phonetic similarity between those elements – held that the marks gave rise to "quite different visual impressions" (paragraph 41).

31. Mr Tritton relied in particular on the following passage in the Court of First Instance decision in *Simons Farsons Cisk plc v OHIM*, Case T-3/04, [2005] ECR II-4837 at [46]:

46. A compound trade mark cannot be regarded as being similar to another trade mark which is identical or similar to one of the components of the compound mark unless that component forms the dominant element within the overall impression created by the compound mark. That is the case where that component is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the

overall impression created by it (Case T-6/01 *Matratzen Concord v OHIM – Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 33).

32. He drew attention to the fact that the hearing officer quoted passages from the above case, including paragraphs 45 and 47, but failed to mention “the critical” paragraph quoted above. I do not see this omission as having particular significance. The hearing officer clearly understood the general principles applicable to comparing trade marks under section 5(2)(b) of the Act and he referred to past cases of relevance to the current one both in the body of the text and in his footnotes. The latter included the European Court of Justice (“ECJ”) decision in *Société des Produits Nestlé SA v OHIM*, Case C-193/06, [2007] ECR I-30. Although this decision is unfortunately only available on the Court’s website in French, it cites with approval paragraphs from *OHIM v Shaker di L Laudato & C Sas* Case C-334/05 P, [2007] ECR I-4529, which appear later in the Decision (at paragraph 56), and are useful to quote here:

41. It is important to note that, according to the case-law of the Court, in the context of consideration of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see order in *Matratzen Concord v OHIM*, paragraph 32; *Medion*, paragraph 29).

42. As the Advocate General pointed out in point 21 of her Opinion, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element.

33. It is plain from this guidance that it is not inherently contradictory to find that the dominant features of two marks under analysis are very similar and yet to conclude that the two marks are quite different when each is compared with the other as a whole.

34. In this case, the hearing officer first identified a number of specific differences between the marks, including the following:

- The “LE” in the Mark has “a noticeable perceptual effect as it makes the mark appear to be French”. In contrast, “there is no French connotation attached” to the Logo.
- The Logo “will lead the average, relevant consumer to expect a product”, which is not the case for the Mark.
- The hexagon device in the Logo is “completely alien to” the Mark, as are the words AUTHENTIC and PRODUCT.

- The “LE” in the Mark is “totally alien to” the Logo.
35. Mr Tritton says that the description of the hexagon device and the words AUTHENTIC and PRODUCT as “completely alien” to the Mark is very puzzling because the hearing officer’s finding that TRAPPIST was the dominant element of the Logo must have meant that he found the other elements to be of negligible effect. There are three points here. Firstly, it does not follow from the fact that one element of a mark is dominant that the other elements are negligible. Secondly, the hearing officer expressly considered the other elements in this case. He described the words ‘authentic’ and ‘product’ as being “highly descriptive” and said the hexagon device would “not dominate the perception of a consumer”; but he did not say that they were of negligible effect. Thirdly, he correctly moved from his consideration of the separate features of the marks to considering their overall impression.
36. While the terminology “completely alien” is perhaps a little strange in the context used, I think that any objection to this boils down to a criticism of the hearing officer’s way of expressing himself, rather than a genuine basis for revisiting his conclusion that followed. The hearing officer is essentially saying that the presence of the hexagon device and the additional (albeit descriptive) words in the Logo, as against the “LE” in the Mark, were together sufficient to make the overall visual impressions of the two marks quite different from one another. That seems to me to be an entirely rational finding and I disagree that it is contradictory to his earlier analysis.
37. I also reject the additional suggestion that was made in oral submission that the hearing officer compared the two marks side by side, forgetting to take account of the relevant consumer’s imperfect recollection of the Logo. He clearly knew that he had to do this, and I believe that he did so: see paragraphs 38, 40 and 55 of the Decision, all reproduced above.

Ground (2): Degree of distinctiveness of the Logo

38. The Opponent objects to the hearing officer’s finding that, for the average, relevant consumer, the Logo “will describe a characteristic or quality and so have a very low degree of inherent distinctiveness, a low degree that is not improved by the use that has been shown” (paragraph 53).
39. It is clear from the text immediately preceding this finding that the “characteristic or quality” referred to is that the product has been made by Trappists or comes from a Trappist monastery. The Opponent agrees that this is what would be perceived by the consumer, but argues that this does not support a finding of lack of distinctiveness in the case of a collective mark. The whole point of a collective mark is to indicate that products come from a particular group of authorised users (in this

case certain Trappist monasteries) as opposed to any other undertaking. Thus the fact that the average consumer immediately perceives this link is a positive factor which demonstrates distinctiveness of the mark.

40. Mr Tritton used two analogies to support his argument. First, he asserted that the hearing officer's finding was analogous to suggesting that CHAMPAGNE has low distinctiveness because it indicates products made by sparkling wine producers in the Champagne region, whereas no-one would really suggest that CHAMPAGNE was not distinctive. Secondly, he argued that the finding was equivalent to stating that the mark COCA-COLA tells the average consumer that the product to which it is attached has the characteristic or quality of having been made by the Coca-Cola Company or in a Coca-Cola factory and therefore has a very low distinctive character.
41. Neither of these analogies really helps with the issue of inherent distinctiveness. Both CHAMPAGNE and COCA-COLA have been used extensively as names to market beverages of authorised Champagne producers on the one hand and of the Coca-Cola Company on the other. As a result of that use, the mark COCA-COLA on a product delivers a simple and strong message, to the effect that it emanates from or is authorised by the Coca-Cola Company. The name CHAMPAGNE delivers what is also a strong, but a slightly more complex message, that the product is a naturally sparkling wine that emanates from one of a number of authorised vineyards in the Champagne District of France. (See the discussion and finding to that effect of *Danckwerts J in J. Bollinger and Others v The Costa Brava Company Limited* [1961] RPC 116, particularly at p.123, line 40; also see *Taittinger SA and Others v Allbev Ltd and Another* [1993] FSR 641, per Gibson LJ at pp.661 and 665.)
42. Mr Tritton is plainly right when he says that CHAMPAGNE is highly distinctive in relation to sparkling wine notwithstanding its descriptive link to a region of the same name. But the reason for that high distinctiveness is that consumers have been educated about the meaning of the name when used as a mark on products. They might not be able to identify the precise differences between "real" Champagne and other types of sparkling wine, but they understand that there is a meaningful difference and that sparkling wine producers who are not from the Champagne region and/or do not comply with the appropriate methods so as to be authorised may not mark their products with the name CHAMPAGNE. I do not know when border lines were first drawn around the Champagne region, or when the system of regulation began. However, before the first borders and regulations were put in place, there must have been a time when the name CHAMPAGNE did not mean any more than a geographical name for a wine producing region. At that point, it could not have been said to be distinctive of any particular group of wine producers in the

way that it is now. That was the point at which an analogy with the inherent distinctiveness of the word TRAPPIST for beers might have been appropriate.

43. As the hearing officer stated, the distinctiveness of a mark has to be assessed both by reference to the goods for which it is registered and through the perception of the relevant average consumer. The hearing officer found that such a consumer would recognise the name TRAPPIST as being that of a religious order. I did not understand from the documents on the file prior to the hearing that the Opponent took issue with this finding. However, it transpired in submission that the Opponent thought the hearing officer should have gone further and found that the relevant consumer would also be aware that Trappists make beer. It is not clear to me that it was argued at first instance that this was a notorious fact of which the hearing officer should have taken judicial notice. However, even if it was, I do not consider that it is such a notorious fact. Based on my own general knowledge and on the evidence submitted in this case, I am prepared to accept that the average consumer of beers and other goods covered by the Opponent's earlier trade marks would recognise the name Trappist as being that of a religious order (as the hearing officer found), but not that there would also be general knowledge of the fact that Trappists are a beer-making religious order. Indeed, it is only a small minority of Trappist monasteries in a minority of countries where they are based which do produce beer for sale.
44. Accordingly, for the purpose of considering the inherent distinctiveness of the Logo, the hearing officer was right to assume that the relevant average consumer was not aware of the Trappists' trading activities. If one were considering just the word TRAPPIST as a collective mark, I believe that – without significant use and investment in promoting it as a trade mark – it cannot be said to be inherently distinctive as a trade mark (even a collective trade mark) as opposed to being a word with a well-defined meaning. But the earlier mark in issue is not just TRAPPIST; it is the Logo comprising the words "AUTHENTIC TRAPPIST PRODUCT" in a hexagon device. In this case, notwithstanding the consumer's prior ignorance of Trappists' trading activities, the Logo itself tells the consumer (as the hearing officer found) that the product to which it is affixed has a trading connection with Trappists. I agree with Mr Tritton that such a message is the very essence of a collective mark. I also believe that consumers would assume that the Logo would only be authorised for use on products approved by a person or group from within the Trappist order. In my view, a collective mark that delivers such messages should be considered to have quite a strong distinctive character, and I think that the hearing officer did err in failing to take proper account of the fact that he was dealing with a collective mark when he stated otherwise at this point in the Decision.
45. The hearing officer's starting point for distinctiveness should therefore have been different when he went on to consider whether the use made of the Logo had made it

more distinctive. Based on the discussion of the evidence of use of the Logo in relation to section 5(3) below, however, I am not persuaded that this will have resulted in any significant increase in distinctiveness. On that front, I agree with the hearing officer's conclusion. However, the error in his characterisation of the Logo as having a low degree of distinctiveness means that his reasoning that followed needs to be re-assessed.

Ground (3): Failure to adopt a structured approach

46. Under the third ground of appeal, the Opponent contends that in considering the issue of likelihood of confusion the hearing officer failed to consider in particular:

- a. the high degree of similarity that exists between beers and, for example, public house services;
- b. the fact that phonetically, conceptually and visually the marks are very similar;
- c. the fact that the Opponent's mark is highly distinctive for a collective mark; and
- d. the fact that he was dealing with someone who could be an impulse purchaser, not a careful consumer, –

whereas, if he had done so, he would have been bound to find that there was a likelihood of confusion.

47. Mr Tritton focused particularly on paragraph 60 of the Decision (reproduced earlier) as having been critical to the finding of no likelihood of confusion, and yet appearing to ignore the points listed above. He argued that it was internally illogical and took me through a detailed critique of the text. He also claimed that the hearing officer had "over-intellectualised" the whole issue and thereby fell into error.

48. Taking each of these points in turn, following the above lettering:

- a. In relation to the **similarity of goods and services**, the hearing officer carefully went through all of the relevant comparisons and concluded *inter alia* that "beers" and "alcoholic beverages" are similar to "bar, café and public house services". The Opponent did not try to persuade me that his assessment was wrong or that he should have concluded that they were "very similar" rather than merely using the word "similar". He did find similarity, and did take this into account (as he did in relation to the other goods and services comparisons where he found similarity).
- b. So far as **similarity of marks** is concerned, I have already rejected the Opponent's objection to the finding of visual difference between the marks. The hearing officer also dealt with the phonetic and conceptual similarities and

differences carefully, and took these into account when considering the likelihood of confusion.

- c. As discussed under the second ground of appeal above, I agree that the hearing officer was wrong to describe the Logo as having low **distinctiveness**. It is thus appropriate for me to consider whether the result would or should have been any different had he not done so.
 - d. The hearing officer stated at paragraph 38 of the Decision that he would take into account “the lowest common denominator”, being for example “the impulse purchaser”, in relation to whom the potential effects of **imperfect recollection** were increased. I have not been persuaded that the hearing officer had forgotten about this by the time he considered the likelihood of confusion.
49. I am unable to agree with the criticisms aimed at paragraph 60 of the Decision by Mr Tritton. It is certainly not appropriate to treat that paragraph as containing the sum of the hearing officer’s reasoning, as if he had forgotten about the matters covered previously in relation to the characteristics of the relevant consumer, the comparison of marks, the comparison of goods and the other factors involved in this multi-factorial analysis.
50. As far as the criticism of having “over-intellectualised” the issue of likelihood of confusion is concerned, I do not think that this is anything more than a criticism of the way in which the hearing officer expressed himself. While the Decision contains some lengthy footnotes and a minor diversion into the distinction between the “sense” and “meaning” of a mark, these are not indicative of error.
51. Although I have disagreed with the hearing officer on his assessment of the distinctiveness of the Logo as a collective mark, I do not believe that this led to an incorrect result. He clearly took into account the fact that, as Mr Tritton put it, the Logo “shouts” that it has been produced by Trappists. Since that was the very nature of the distinctiveness for which Mr Tritton argued, and with which I have agreed, it seems to me that the hearing officer did actually take that factor into account. Since he did however make the statement that the Logo had low distinctiveness, I have re-considered the question of likelihood of confusion myself.
52. After taking account of all the factors already discussed, the overall question is whether it is likely that the average consumer, being reasonably observant and circumspect, albeit possibly in the situation of an impulse purchase, would be confused into believing that (using the most similar of the Applicant’s services to the Opponent’s goods) a bar or chain of bars trading under the name LE TRAPPISTE had a trade connection with the beers sold by reference to the Logo or with their manufacturing source.

53. Mr Tritton submitted that this situation was very similar to the use of the mark THEAKSTONS for a chain of pubs. The mark is known to be the name of a brewer. It is also common in the United Kingdom to have pubs that are tied to brewers. In those circumstances, it would be assumed that THEAKSTONS pubs were connected in the course of trade with THEAKSTONS beer. That may well be correct, but again the analogy is dependent on the consumer's knowledge of THEAKSTONS as the trade identifier of a beer or brewer. Here, I have not been persuaded that TRAPPIST *per se* is known as the trade identifier of beer-producing Trappists or any group of them. And although the consumer who sees the Logo containing the words AUTHENTIC TRAPPIST PRODUCT on a beer bottle will probably assume that the beer emanates from Trappists, that does not mean that it will assume that bars called LE TRAPPISTE are similarly connected. The fact that the word TRAPPISTE would call the Trappist religious order to mind is not enough. That simply shows that he or she knows the meaning of the word. Section 5(2)(b) requires a "connection in the course of trade" to be made. Even if the consumer concerned had repeatedly seen the Logo on beers and even on other products in the Opponent's collective trade mark specifications, the evidence does not persuade me that such a connection is likely to be made.

54. I therefore conclude that there is no basis for setting aside the Hearing Officer's decision in relation to the ground of opposition under section 5(2)(b).

Section 5(3)

55. The Hearing Officer dealt with the ground of opposition under section 5(3) of the Act in just three paragraphs, as follows:

62) For its claim to be considered under section 5(3) of the Act ITA must establish that its collective mark is known to "a significant part of the public concerned by the products or services covered"[footnote: *General Motors Corporation v Yplon SA* Case C-375/97 [2000] RPC 572]. Following the judgment of Mr Geoffrey Hobbs QC, sitting as a deputy high court judge, in *Whirlpool Corporations and others v Kenwood Limited* [2008] EWHC 1930 (Ch) use in the United Kingdom can be enough to establish the requisite reputation for a Community mark:

"76.....I think that the aim should generally be to prevent conflict occurring in any substantial part of the Community and that the United Kingdom can for that purpose be regarded as a substantial part of the Community, with or without the addition of France and Germany."

63) In the period 2000 – 2006 the sales of all of the beers amounted to 0.69% of Belgian beers sold in the United Kingdom. There is no indication as to the percentage of the whole United Kingdom beer market that the beers have but it must be considerably smaller than that. The collective mark has not been promoted in any way. It is used as a subsidiary mark. Mr Tritton tried to lay claim to use of the word TRAPPIST to support his case. I have to consider the mark that is registered, not another mark. Mr Tritton was not able to support this submission re taking into account the use of the word TRAPPIST with any case law.

64) It is possible for marks with limited sales to have exceptional reputations, to become almost part of the common lexicon; that is a question of fact and there is nothing to suggest that ITA has achieved this in relation to its collective mark. **I do not have the slightest hesitation in finding that ITA has not established that at the material date it had the requisite reputation. The grounds of opposition under section 5(3) of the Act, therefore, are dismissed.**

Ground (4): failure to find a reputation

56. The Opponent's fourth ground of appeal was that the hearing officer erred in finding that the Logo did not have the requisite reputation for it to benefit from the type of protection afforded by section 5(3) of the Act. Mr Tritton argued that the hearing officer incorrectly took a "reductionist approach" to the issue of reputation which is not warranted by the authorities, in particular, by only taking into account market share and not other factors.
57. The parallel infringement provision to section 5(3) of the Act is section 10(3), which is the domestic version of article 5(2) of the Directive, in relation to which the ECJ gave the following guidance in *General Motors v Yplon* [1999] ETMR 950:
24. The public amongst which the earlier trade mark must have acquired a reputation is that concerned by that trade mark, that is to say, depending on the product or service marketed, either the public at large or a more specialised public, for example traders in a specific sector.
25. It cannot be inferred from either the letter or the spirit of article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.
26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.
27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investments made by the undertaking in promoting it.
58. The ECJ confirmed in the subsequent case of *Intel Corporation Inc v CPM United Kingdom Limited (INTELMARK)* Case C-252/07, [2009] ETMR 13 (at [34]) that the reputation of a trade mark must be assessed by reference to the average consumer of the goods or services for which the mark is registered, who are reasonably well informed and reasonably observant and circumspect. This is the same as the average consumer who had been identified by the hearing officer when considering section 5(2)(b) of the Act.
59. Mr Tritton referred me to the Court of First Instance ("CFI") decision in *Antartica Srl v OHIM* Case T-47/06, [2007] ETMR 77 at [46] which reiterated and applied paragraph [24] of *General Motors* to the effect that it may be appropriate to consider a more specialised public than the public at large, such as "traders in a specific sector". I thought that this was intended to support the proposition that one should

pay particular attention to consumers of speciality or premium beers in this case, or even to their distributors, but the point was not developed before me. In any event, it was clear from the context in *Antartica* that the services listed in the relevant trade mark specification were such as to require consideration of a specialised consumer. In contrast, the specified goods in this case are not. Community collective mark no. 887455 is registered in respect of “beers”, not “speciality beers” or even “Belgian beers”.

60. Between the Decision and the hearing of the appeal, Advocate-General Sharpston had delivered her Opinion in *PAGO International GmbH v Tirol Milch registrierte Genossenschaft mbH* Case C-301/07, which concerned a reference from the Austrian Supreme Court (Oberster Gerichtshof) on the interpretation of the equivalent infringement provision for Community trade marks to section 10(3) for UK trade marks (section 9(1)(c) of the Regulation). This raised uncertainty as to whether the hearing officer’s reliance on *Whirlpool Corporation and others v Kenwood Limited* [2008] EWHC 1930 (Ch), [2009] ETMR 5 in relation to the territorial scope of the requisite reputation for a Community trade mark was safe. The day after our appeal hearing, the decision in *Whirlpool* was upheld on appeal, but without express consideration of this point: *Whirlpool Corporation and others v Kenwood Limited* [2009] EWCA Civ 793, [2010] ETMR 7. Subsequently, the ECJ issued its decision in *PAGO* (reported at [2010] ETMR 5), which contained the following guidance:

29. As the present case concerns a Community trade mark with a reputation throughout the territory of a Member State, namely Austria, the view may be taken, regard being had to the circumstances of the main proceedings, that the territorial requirement imposed by Article 9(1)(c) of the regulation is satisfied

30. The answer to the first question referred is therefore that Article 9(1)(c) of the regulation must be interpreted as meaning that, in order to benefit from the protection afforded in that provision, a Community trade mark must be known by a significant part of the public concerned by the products or services covered by that trade mark, in a substantial part of the territory of the Community, and that, in view of the facts of the main proceedings, the territory of the Member State in question may be considered to constitute a substantial part of the territory of the Community.

61. One can engage in semantic debate as to whether there is a difference between the ECJ’s guidance, which speaks of a mark with a reputation “throughout” a member state, and the approach of the English Court in *Whirlpool*, which referred to a reputation “in” the United Kingdom being sufficient. It is certainly possible to argue that the respective courts meant slightly different things, given the different reasoning set out in each case. However, I do not find it necessary to pursue that debate in this case since – if anything – the guidance from *Whirlpool* on which the hearing officer relied was more generous to the Opponent than that subsequently given in *PAGO*. In other words, if the evidence of reputation did not satisfy the

Whirlpool test, then it would definitely not pass the *PAGO* test. I only need to consider the latter if I think the hearing officer was wrong under *Whirlpool*.

62. Was the Opponent correct to say that the hearing officer only looked at market share? I do not believe so. The key paragraph 63 of the Decision itself refers to other factors. The first sentence refers to the sales of all the beers marketed under the Logo between 2000 and 2006. I take from that that the hearing officer was taking into account the sales figures that had been submitted in evidence and which he had already summarised. Secondly, he took into account the lack of promotion of the Logo. Thirdly, he pointed out that the Logo was used as a subsidiary mark. This was clear from the examples of use in the evidence, where a more prominent primary mark was always used as the name for the particular beer.
63. Although the hearing officer did not spell out the relevant factors to be taken into account, as identified in paragraph 27 of *General Motors*, he did refer to the case itself in a footnote and he is an experienced and specialised hearing officer who can be taken to be well-aware of these factors in the absence of indications to the contrary. He had conducted a careful review of the evidence and summarised it earlier in the decision in terms to which the Opponent has not objected. I do not accept that he then ignored the evidence that he had reviewed.
64. Mr Tritton emphasised the unchallenged evidence that 4.3 million pints (20,418 hectolitres) of beer had been sold under the Logo between 2001 and 2006, supported by letters from UK importers confirming that sales of specific Trappist beers endorsed with the Logo had taken place all the way back to the 1980s. He said that, since there are a large number of brands in the beer market, the market can be considered fragmented, so that a small market share means little. A premium product in such a market can become a well-known “niche” brand.
65. It seems to me that all of these submissions were considered by the hearing officer. He accepted both the evidence of sales and the existence of numerous beer brands (paragraph 35). He also accepted that it was possible for marks with limited sales to have exceptional reputations (paragraph 64). (I do not believe that this use of the word “exceptional” means that he was imposing an enhanced definition of the requisite reputation; he simply meant “exceptional” by reference to a mark for a product with low sales figures.) However, in the absence of evidence to that effect, he felt that a low market share was a strongly negative factor.
66. I agree. In circumstances where the Opponent’s beers amounted to only 0.69% of Belgian beers sold in the United Kingdom and by inference a much smaller proportion of all beers sold, there needed to be some much stronger evidence than there was to support the allegation that a significant part of the relevant public knew the Logo as at the filing date for the Mark. The evidence comprising extracts from

websites, cook books, articles and a “Best Beer” award for one of the Trappist beers received at the Real Ale Festival in August 1996 provides clear support for the claim that sales had taken place under the Logo and that Trappist beers had a place in listings of specialist ales or Belgian beers by the relevant date. But it does not demonstrate that the Logo has acquired the necessary reputation under section 5(3).

67. Mr Tritton placed some reliance in his skeleton argument on the fact that Mr Van Gool stated his belief that the mark “Authentic Trappist Product” was well known to the general public and to buyers and suppliers of beers in the United Kingdom and was uniquely associated with the Opponent and its members, and his belief that Trappist beers are widely known as Belgian specialty beers in the United Kingdom. Even apart from the fact that these statements do not appear to relate to the Logo as such, but to elements within it, I think that Mr Tritton accepted in his oral submissions that these statements of belief could not be taken as statements of market fact in the absence of support from elsewhere in the evidence.
68. It was also argued before me that the Applicant’s witness, Mr Matthews, himself alluded to the strong reputation of Trappist beers when he said that the name of his existing bar was intended to evoke “things Belgian” in the minds of beer drinkers and was an appropriate name for a Belgian café bar stocking and selling over a hundred different Belgian beers, including beers from Trappist monasteries. However, when one looks at his statement, it is clear that Mr Matthews’ focus was on the combination of the name LE TRAPPISTE with the sale of Belgian beers, as well as other Belgian features (the national flag and aspects of the menu) to give a Belgian flavour. He did not in so doing state or even impliedly accept that the Logo itself had a reputation in the eyes of the relevant consumer.
69. The hearing officer’s conclusion that the Logo had not acquired the necessary level of reputation to be afforded the enhanced protection required to oppose a later trade mark under section 5(3) thus appears to me to have been correct. I therefore reject the fourth ground of appeal in relation to this ground of opposition and it is not necessary for me to deal with the additional submissions of the Opponent as to the other requirements of a case under the section.

Section 5(4)(a)

70. The hearing officer started his analysis of the ground of opposition under section 5(4)(a) of the Act by quoting a passage from the well-known “*Jif Lemon*” case, *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341, in which Lord Oliver summarised the law of passing off. This was followed by an extract from Lord Macnaghten’s discussion of the concept of “goodwill” in *IRC v Muller & Co’s Margarine Ltd* [1901] AC 217. He then considered the question of whether the Opponent had locus standi to oppose under section 5(4)(a) in place of one or more of

the various beer-brewing Trappist monasteries whose trading activities are relied on to establish goodwill. He concluded that, since the opposition was commenced before The Trade Marks (Relative Grounds) Order 2007 (SI 2007 No.1976) came into force, which requires an opponent to be the proprietor of an earlier right relied on under section 5(4)(a), the Opponent could legitimately rely on the goodwill of its members to support this ground of opposition. The hearing officer also determined that the relevant date by which the Opponent had to establish the requisite goodwill and the likelihood that use of the Mark would lead to passing off was the application date, 23 May 2006. None of these points are in contention on appeal.

71. The Opponent claimed to have built up a reputation and goodwill in the United Kingdom by reference to the name TRAPPIST, the Logo and/or the words within it in relation to beers.

72. The hearing officer reviewed the press articles relied on by the Opponent as examples of use of the name TRAPPIST in relation to beers and looked at how this name (separately from the Logo) had been used on labelling. He stated that there was nothing in the evidence to suggest that any undertaking other than the Opponent had used the term TRAPPIST in the United Kingdom in relation to beers. He considered some of the “drinks cases” in the field of passing off, such as *Taittinger SA v Allbev* (cited above) and *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1980] RPC 31 (HL) which established that a term that is descriptive of a type of product (*Champagne* and *Advocaat* in these two examples) can enjoy a protectable goodwill.

73. The hearing officer then correctly directed himself as to the proper approach under section 5(4)(a), as follows:

74) In considering passing-off one is not simply considering a sign against sign comparison, as with section 5(2)(b) of the Act. In relation to the application one is considering normal and fair use of the trade mark in relation to all of the services of the specification. In relation to the signs upon which ITA relies one has to consider everything surrounding them, everything that will effect (sic.) the reaction of the average consumer who knows of the sign and its use.

(See *Wild Child Trade Mark* [1998] RPC 455, per Geoffrey Hobbs QC sitting as the Appointed Person at [50].)

74. The paragraphs under scrutiny in this appeal were as follows:

75) The first sign upon which the average consumer will identify and rely upon is the brand of the beer, this is what he or she is purchasing, as there is no Trappist characteristic per se. The beers being sold are premium products and in small numbers, the consumer of these products will generally be knowledgeable and is likely to be an aficionado of beers. (This reflects the actual purchasers rather than the wide public that has to be considered for the purchase of beers in relation to the establishment of a reputation for section 5(3) of the Act.) This customer will not

know of any tradition of Trappists setting up licensed premises in the United Kingdom. Indeed, the idea of Trappists setting up such premises, even if under licence, would appear quite bizarre. There has been nothing in the nature of the trade in the United Kingdom that would lead the person who knows of Trappist beers to the conclusion that Trappists would have tied premises, in the way that some brewers have. There is no indication that there are Trappist monasteries in the United Kingdom which have licences for the sale of alcoholic beverages.

76) I accept that the two signs upon which ITA relies are identified with the goodwill of the businesses of the brewers who make use of them.

77) ITA must demonstrate that there is likely to be a misrepresentation by Vrijheid (this being to all intents and purposes a *quia timet* action, see above re material date) leading or likely to lead the relevant public to believe that it is responsible for the services offered by Vrijheid in some way. This responsibility could be in the nature of ownership or licensing. There is no evidence that the various breweries who trade with reference to the two signs upon which ITA relies have entered into any licence arrangements. All the evidence is against this type of activity existing. The misrepresentation might, in relation to the erosion of the distinctiveness of the two signs, be something more fugitive but it still must bring back the consumer to an identification with the goodwill of one or more of the brewers. I do not consider that the average consumer will believe that there is any relation between the services of the application and the Trappist brewers. **Taking into account all the factors surrounding the goodwill of the various brewers, the nature of the signs upon which ITA relies, the nature of Vrijheid's trade mark and the nature of the services of the application I do not consider that there will be a misrepresentation.**

Ground (5): error in approach to the section 5(4)(a) ground

75. The heading immediately above gives a flavour of the generality of the Opponent's complaint in relation to the Decision under section 5(4)(a). I was really being invited to take another look myself and see if I might come to a different conclusion in relation to whether a "notional passing off" case might have been sustainable if brought by the Trappist brewers against the use of LE TRAPPISTE as a name for a chain of bars (and other food and drink outlets and services as identified in the Applicant's specification) at the application date for the Mark.
76. Of course, I am not allowed to take another look if the hearing officer made no real error. The primary error identified by the Opponent was that the hearing officer's finding that the idea of Trappists setting up licensed premises in the United Kingdom was "quite bizarre" could not be given any weight since one could equally say that the idea of Trappist monks selling beer in the United Kingdom was bizarre, whereas the reality is that some Trappist monasteries have engaged in that commercial activity for many years. As Mr Tritton put it, if they can sell beer in the UK, why not open up licensed premises or set up a franchise? It was an unjustified assumption that a religious order would not engage in such trading activities.
77. Again, the THEAKSTONS analogy was used. But again, there are differences. As the hearing officer correctly stated, United Kingdom consumers would not expect

Trappists to have tied premises, whereas that would be a reasonable expectation in the case of a known English brewery, whether or not it was in fact the case. Further, what the hearing officer did not actually say at this point, but which is clear from his earlier comparison of the actual Mark applied for with the name TRAPPIST and the Logo is that LE TRAPPISTE is a sufficiently different name that even for those Belgian beer connoisseurs who are very knowledgeable about Trappist beers, they would be unlikely to assume that LE TRAPPISTE bars are operated, licensed or franchised by the makers of those beers. It is simply a leap too far. The THEAKSTONS analogy should in fact perhaps be THE THEAKSTON. I am not sure that consumers would automatically assume that pubs or bars under this name are licensed by Theakstons brewery. They might, but I would need to be persuaded by evidence. In any event, the analogy breaks down because THEAKSTONS is not the name of a religious order based overseas, where only a limited number of beer connoisseurs know that it produces beer.

78. I am therefore not persuaded that I should overturn the Decision in relation to section 5(4)(a).

Conclusion

79. In conclusion, I reject the Opponent's appeal on all counts. The opposition fails and the Mark should proceed to grant.

80. The Opponent's appeal having failed, I shall leave the first instance costs award of £1,000 in favour of the Applicant in place. Although the hearing officer ordered that this amount be paid within seven days of the final determination of the case if an appeal was brought and failed, I shall extend this to 14 days from notification of this decision, in view of the disruption to business caused by the recent bad weather.

81. The Applicant did not participate in the appeal. I would expect the Applicant's representatives on the record to have considered and advised on the Notice of appeal for their clients, but I have no evidence about this or whether the Applicant was charged for it. It would be wrong to order the Opponent to make a contribution to costs that had not in fact been incurred. In the absence of any request for costs by the Applicant, I have decided to make no costs order on the appeal.



ANNA CARBONI

13th January 2010

The Opponent (Appellant) was represented by Counsel, Guy Tritton, instructed by Taylor Wessing. The Applicant (Respondent) was not represented.