

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3758673 IN THE NAME OF FALL CREEK FARM AND NURSERY, INC.

AND OPPOSITION NO. 433339 THERETO BY RUSTICAS DEL GUADALQUIVIR S.L.

AND IN APPLICATION FOR REVOCATION UNDER NO. 505583 BY FALL CREEK FARM AND NURSERY, INC. AGAINST TRADE MARK REGISTRATION NO. UK00905866074 IN THE NAME OF RUSTICAS DEL GUADALQUIVIR S.L.

DECISION

Introduction

1. This is an appeal by Rusticas Del Guadalquivir S.L. (“*the opponent*”) against the decision of Mark King, acting on behalf of the Registrar of Trade Marks, dated 24 February 2025 (O-0163-25) (“*the Decision*”), in which the opposition was unsuccessful and the application for revocation was partially successful. The opponent was ordered to pay to Fall Creek Farm and Nursery, Inc. £1,300 as a contribution to its costs.
2. On 24 February 2022 the applicant applied to registered that mark **SEKOYA**. The application was published on 11 March 2022 with respect to ‘*Living plants; fresh fruit*’ in Class 31. Hereinafter referred to as “*the Application*”.
3. On 10 May 2022 the Application was opposed by the opponent on the basis of section 5(2)(b) of the Trade Marks Act 1994. For that purpose, the opponent relied upon the following earlier trade mark (“*the earlier mark*”):

Mark: **SEQUOIA**

Number: 905866074

Application date: 30 April 2007

Registration date: 29 February 2008

Goods: Class 31 - Fresh fruits and vegetables

4. The opponent submitted that as the respective marks are phonetically identical and visually highly similar; and the respective goods are identical there is a high likelihood of confusion.
5. The applicant filed a counterstatement setting out why there was no likelihood of confusion and putting the opponent to proof of use of the earlier mark.
6. Subsequently on 25 November 2022 the applicant sought revocation of the earlier

mark for all the goods for which it was registered pursuant to section 46(1)(a) and (b) of the 1994 Act. It identified 3 different 5-year periods for the purposes of its application for revocation.

7. The opponent filed a counterstatement in which it defended its registration for all the goods with respect to which the earlier mark was registered.
8. Both parties filed evidence and written submissions. Neither party requested to be heard and therefore the Hearing Officer proceeded to make the Decision on the basis of the papers before him.
9. The applicant was represented by CMS Cameron McKenna Nabarro Olswang LLP and the opponent was represented by Elys IP Limited.
10. In the Decision the Hearing Officer first considered the application for revocation of the earlier mark. Having set out the applicable law the Hearing Officer went on to conclude on the basis of the evidence before him that with respect to each of the relevant periods he had to consider (including that required for the purposes of the proof of use in the context of the opposition) that the opponent could only rely upon the earlier mark in respect of “*cherries*” in Class 31.
11. The Hearing Officer then went on to consider the opposition under section 5(2)(b) of the 1994 Act and found as summarised in paragraph [75] of his Decision as follows:
 - the marks to be visually similar to a degree above low but not as high as medium, aurally identical and they are conceptually neutral.
 - The earlier mark has a high degree of inherent distinctive character.
 - The average consumer is the general public who will predominantly purchase the goods following a visual inspection, though I do not discount an aural element to the purchase.
 - I have found the goods to be either identical or similar to a low degree.

12. On the basis of those findings the Hearing Officer went on to find that there was no likelihood of confusion (direct or indirect). Accordingly, the opposition failed.

The Grounds of Appeal

13. In a TM55P dated 7 April 2025 the opponent appealed the Decision. It did so on a number of grounds. In the Statement of Grounds the opponent identified the issues for determination as follows:

5. The main issues of the Appointed Person to determine are whether or not the Hearing Officer misdirected himself in finding that:

- (1) the goods “living plants” and “cherries” are similar only to a low degree;
- (2) the respective marks are visually similar only to an above low but less than medium degree;
- (3) the respective marks are conceptually neutral;
- (4) the differences between the marks outweighed the similarities overall.

6. [The opponent] submits that the Hearing Officer did misdirect himself in relation to the above issues and that all of his findings in relation to section 5(2)(b) flowed from these errors.

14. The applicant filed a Respondent’s Notice dated 30 April 2025. In paragraph 2 of the Respondent’s Notice it was expressly stated that it was being filed pursuant to Rule 71(5) of the Trade Mark Rules 2008.
15. In the summary of the Respondent’s argument set out in the Respondent’s Notice and further explained in the applicant’s skeleton of argument it was maintained that the Decision should stand for essentially the following reasons:
 - (1) Given that there is no appeal against the finding that “*fresh fruit*” and “*cherries*” are identical the Application cannot logically be refused in respect of goods which the opponent alleges are merely complementary. On that basis it is said that the Notice of Appeal should be struck out as providing no basis upon which the Decision could be overturned.
 - (2) Further or alternatively the findings challenged by the opponent contained no material error and no flaw in the reasoning of the Decision had been identified by the opponent such that the appeal should be dismissed.
 - (3) Alternatively, the Decision should be maintained on alternative grounds that is to say that the Hearing Officer could and should have found that the evidence did not establish any relevant use of the earlier mark such that the opposition should have been dismissed on that basis.
16. At the hearing of the appeal which took place by video link the opponent was represented by Ms Yvonne Onomor of Elys IP Limited and the applicant by Mr Stuart Brooks of CMS Cameron McKenna Nabarro Olswang LLP.

The Standard of Review

17. The Supreme Court most recently restated the approach to appeals of this kind in its judgment in Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc [2025] UKSC 25 at [93] to [95] as follows (emphasis added):

93. **The question whether there is a trade-mark infringement under section 10(2)(b) of the Act is a classic example of what has come to be known as a multi-factorial assessment. It involves the finding of primary facts, the application of relevant principles or rules of law to those facts and the evaluative decision whether, thus considered, something has happened which falls within (here) a statutory definition.** In the present case those definitions are similarity and confusion, and the existence of the requisite causative link between the two, as required by section 10(2)(b), as well as the artificial (largely judge made) construct of the average consumer, through whose eyes similarity and confusion have to be gauged.

94. **It is perhaps obvious, and certainly an inevitable conclusion drawn from experience, that reasonable minds, and in particular reasonable judicially trained minds, each faithfully applying the relevant law and principles, will come to different conclusions about the answer to these multifactorial questions.** While of course the decision of an appellate court trumps that of the court below, the law has imposed structured constraints designed to prevent a free for all in a higher court whenever a party (with the necessary resources) wishes to challenge the first instance decision of the trial judge. The reasons for these constraints are set out in a string of well-known authorities including, in the intellectual property context, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ at para 114. The reasons there set out relevantly include the following:

- (i) **The trial is not a dress rehearsal. It is the first and last night of the show.**
- (ii) **Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court.**
- (iii) **In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.**

95. In *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8; [2024] Bus LR 532 this court reviewed those

constraints in a trade mark context. After citing from the *Fage* case this court in a joint judgment said, at paras 49-50:

"49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJ) contributed, the court concluded, at para 76, in terms with which we agree, that **on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.**

50. On the other hand, it is equally clear that, for the decision to be 'wrong' under CPR r 52.21(3), **it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.**"

18. I have kept these principles in mind when considering the present appeal.

Preliminary matter

19. At the start of the hearing of the appeal it was submitted, on behalf of the opponent, that the position of the applicant that the alternative ground for upholding the Hearing Officer's Decision, namely that the Hearing Officer should not have made any finding of use, was not a ground that should properly have been put forward by way of the Respondent's Notice pursuant to Rule 71(5) of the Trade Mark Rules 2008 but rather should have been the subject of a cross-appeal. This was not a point that had previously been raised by the opponent.
20. It was rightly accepted by the applicant at the hearing that this issue should have been brought by way of a cross-appeal and did not fall within Rule 71(5) of the Trade Mark Rules 2008. It was also indicated that the 'cross-appeal' was brought by way of a

‘contingent’ or ‘alternative’ appeal in the event that the opponent was successful on its appeal.

21. At the hearing Mr Brooks indicated that he wished to seek an extension of time for the filing of a cross-appeal however Ms Onomor’s position was that such an extension should not be granted.
22. It is not satisfactory that a cross-appeal was not filed by the applicant. Nor was it satisfactory that no point was taken on this issue by the opponent prior to the hearing of the appeal. The result of this was that the applicant was taken by surprise at the start of the hearing. In this connection I note that the opponent’s skeleton of argument for the purposes of the hearing did not deal with the substance of the issues that fell within the scope of the cross-appeal.
23. That is to say these are not circumstances in which it seems to me it would be equitable to either party to proceed on the basis adopted by Professor Annand sitting as the Appointed Person in AIRBLUE TM Application (O-600-18).
24. Therefore in accordance with my case management powers and in the exercise of my discretion I indicated to the parties that the hearing of the appeal should proceed, on the basis that all issues (both procedural and substantive) relating to the ground in the Respondent’s Notice that should have been the subject to a cross-appeal be determined once the decision on the appeal had been issued. I also indicated that directions would be issued for that purpose in at the end of this decision.

Decision

Similarity of goods

25. The first ground of appeal is concerned with the assessment of the similarity of goods. On this appeal it was accepted that the Hearing Officer correctly stated at paragraph [46] of the Decision the correct legal principles to be applied. It is also accepted that the Hearing Officer’s conclusion that “*cherries*” and “*fresh fruit*” were identical is correct.
26. What is said on behalf of the opponent is that there was a lack of consistency in the finding of the Hearing Officer that there was only a low level of similarity between “*cherries*” and “*living plants*”. In particular, it is maintained that the Hearing Officer’s finding that “*cherries*” and “*living plants*” are not complementary was wrong.
27. The Hearing Officer dealt with the issue at paragraphs [49] and [50] of the Decision as follows (footnotes excluded):

49. The opponent argues that, “The term “fruit” denotes the part of the plant which contains seeds, the rest of the plant is considered a “vegetable”. The term “fresh” means the fruit/vegetable is – or very recently was – still living. There is

therefore no real difference between the phrases “Living plants” and “Fresh fruit and vegetables”.” The applicant disagrees and argues that the goods are neither identical nor similar.

50. Giving “living plants” its ordinary and natural meaning, I do not think of them as being edible goods such as cherries. Therefore, whilst they are natural products, they do differ in purpose. However, they are likely to be produced by the same manufacturers and sold through the same distribution channels. They are unlikely to be in competition or complementary. Overall, I find them to be similar to a low degree.

28. Contrary to the position stated in the Grounds of Appeal the opponent quite rightly accepted that that the Hearing Officer had found that the “*cherries*” and “*living plants*” were sold through the same distribution channels as is clear from paragraph [50] of the Decision. It is also clear from this paragraph that the Hearing Officer did not find that the goods were not complementary but rather that they were ‘*unlikely to be complementary*’.
29. What was emphasised in submissions before me as to why the Hearing Officer was wrong to make the findings he did was his failure to consider first the types of retail outlets where both types of goods were sold for example nurseries, garden centres and farm shops; and second that individuals that grow cherries in their gardens or allotments will purchase cherry plants to try to replicate the cherries that they have purchased when cherries in the UK are out of season. It was accepted before me that there was no evidence on these issues before the Hearing Officer and therefore it could not be suggested on this appeal that the Hearing Officer had not considered such material in reaching his conclusions on this issue.
30. In order to maintain the required distance between the role of the decision taker at first instance and the decision taker on appeal it is necessary for this Tribunal to proceed on the basis that the Decision below should stand unless the matters on which the opponent relies are by force of what they reveal sufficient to establish that the Decision is vitiated by error. See the Decision of Geoffrey Hobbs KC sitting as the Appointed Person at paragraph [19] of LADY LOUISA WATERFORD TM (O-0646-24).
31. I have reviewed the Hearing Officer’s findings on the issue of similarity of goods in the light of the opponent’s criticisms. Having done so, I am satisfied that that these do not reveal any substantive mistakes on the part of the Hearing Officer such as to establish that the Hearing Officer’s findings with respect to his assessment of the similarity of “*cherries*” and “*living plants*”. In my view the conclusions that the Hearing Officer came to on this issue was one that it was clearly open to him to reach.
32. In the circumstances, I dismiss this ground of appeal. For completeness I should add that, like the applicant, I do not understand how even I had taken the opposite view on

this ground of appeal, how this could have assisted the opponent given the unchallenged findings that “cherries” and “fresh fruit” are identical.

Comparison of the marks

33. Whilst it is again accepted that the Hearing Officer correctly identified the approach that he should take to the visual, aural and conceptual comparison between the applicant’s mark and the earlier mark it is said that with respect to his conclusions on the visual and conceptual comparison the Hearing Officer erred. No challenge is made to the conclusion that the applicant’s mark and the earlier mark were aurally identical.

34. With respect to the ground of appeal directed to the assessment of visual similarity I have kept in mind the guidance of Arnold LJ in TVIS Ltd v. Howserv Services Limited [2024] EWCA Civ 1103 at [33] to [35] (emphasis added):

33. TVIS argues that the judge erred in holding that PETSURE is, visually and aurally, merely “similar” to VETSURE and that he should have held that it was highly similar.

34. I do not accept this argument for two reasons. The first is that no error of principle on the part of the judge has been identified. **The assessment of the degree of visual and aural similarity between a sign and a trade mark is a matter for the first instance tribunal.** Nor can it be said that the judge’s assessment is plainly wrong.

35. **The second and more fundamental reason is that, while it is conventional for first instance tribunals in trade mark cases to articulate their assessment of the degree of visual and aural similarity between signs and trade marks using words such as “high”, “medium” or “low”, there is no legal requirement for tribunals to do so. All that is required is for the tribunal to assess the nature and extent of any similarities. This is because what matters is not the verbal label that is applied to the assessment, but whether the similarities in conjunction with the other factors which must be taken into account lead to a likelihood of confusion.** It is possible for there to be no likelihood of confusion despite a relatively high degree of visual and aural similarity. Equally it is possible for there to be a likelihood of confusion despite a relatively low degree of visual and aural similarity. It depends on the other factors that are in play.

35. Dealing first with the appeal with respect to the findings of visual similarity it is contended on behalf of the opponent that the Hearing Officer should have afforded

more weight to the common element between the marks being the first two letters 'SE' as that part of the mark would have higher impact on the average consumer than the remainder of the respective marks. It is maintained that had the Hearing Officer done so he would have found that the marks were similar to an above medium degree.

36. The Hearing Officer's findings were set out in paragraphs [60] to [62] as follows (footnotes omitted):

60. Visually, the opponent argues that "The two marks are visually highly similar. Two thirds of the letters in the Applicant's mark replicate letters in the Opponent's mark in the same order".

61. The applicant argues that "Visually, aurally and conceptually there are irrefutable differences between the respective marks. They are of different length, and in particular the Opponent's Mark contains several different letters which lead to visual differences, such as the letter Q and an umlaut over the letter I. The umlaut is particularly uncommon in the English language and this feature of the Opponent's Mark will draw the attention of the relevant consumer."

62. The opponent is correct that the first two letters are the same, both end with an A and there is an O present in both but I do agree with the points raised by the applicant. I have already said that the umlaut would go relatively unnoticed but balanced along (sic) the other factors highlighted by the applicant, I find the differences outweigh the similarities. Therefore, the marks are similar to a degree above low but not as high as medium.

37. From these findings it is clear that the Hearing Officer had in mind that the first two letters of the respective marks were same. It is also clear that the Hearing Officer correctly had in mind that when making his assessment as he stated in paragraph [56] that *'It would be wrong, . . . , to dissect the marks artificially, although it is necessary to take in to account . . . and to give due wight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks'*. That is clearly what the Hearing Officer did. To suggest that there is some 'rule' that means that the Hearing Officer should have given more weight to his finding with respect to the first two letters such as to displace the legal test that the Hearing Officer applied cannot be accepted. That is all the more the case when the Hearing Officer expressly stated that the two letters at the start of the respective marks were identical.
38. Having reviewed the findings in the light of the criticisms made and in the light of the judgment in TVIS (above) I can see no error in the way that the Hearing Officer approached the issue that was before him or in reaching the conclusion that he did that the respective marks were visually similar to a degree above low but not as high as medium.

39. With respect to the finding that the marks were conceptually neutral the Hearing Officer found at paragraph [64] of his Decision that neither word is an English word. As recorded in paragraphs [66] and [67] both parties to the proceedings would appear to have submitted that the word SEQUOIA is a particular type of redwood tree. At paragraph [68] the Hearing Officer recorded his conclusions on this issue as follows:

I do accept that some consumers may know the meaning of SEQUOIA but not to the extent that this would constitute a significant proportion of average consumers. Rather, a significant proportion of average consumers will see both words as invented. The marks are conceptually neutral.

40. On this appeal it is maintained that a substantial proportion of the public would be aware that SEQUOIA was the name of tree but may not be aware of the specific type of tree or the correct spelling of the name; and that the average consumer would consider both marks as being the name of a tree the Application being perceived as a misspelling of SEQUOIA.
41. There was no suggestion on appeal that there was any material before the Hearing Officer to support that position. Again, it seems to me that the conclusion that the Hearing Officer reached that some but not a substantial proportion of the public would know the meaning of SEQUOIA was one that it was open to him to make. Likewise, it seems to me that it was open to the Hearing Officer to take the view that both marks would be perceived as invented words such that a finding that the marks were conceptually neutral would follow.
42. In the circumstances I dismiss the appeal against the Hearing Officer's assessment of the similarity between the marks in issue.

The likelihood of confusion

43. On the basis of the Notice of Appeal, set out in paragraph 13 above, it was maintained by the opponent that as a result of the errors in the assessments of the similarity of goods and marks the Hearing Officer erred in his findings on the overall assessment. As I have already rejected the appeal against those findings this ground must also fail.
44. At the hearing of the appeal, it maintained that even if the appeal against the findings of similarity of the goods and marks failed that the Hearing Officer should not have found a likelihood of confusion. However, no error of principle or other error over above those already identified and rejected was put forward.
45. In the circumstances there is no basis to interfere with the conclusions of the Hearing Officer. I therefore reject this ground of appeal.

Conclusion

46. On the basis of my findings set out above it does not seem to me that the opponent has identified any error of principle or material error in the Hearing Officer's Decision. Moreover, it is not in my view appropriate to interfere with the evaluations that the Hearing Officer made in reaching the conclusions that he did. In the result the appeal fails and is dismissed.
47. However, for the reasons set out above that is not the end of the matter. There remains the issue of the applicant's application for an extension of time to file a cross-appeal. There also remains the issue of the costs of the appeal.
48. The Appointed Person does not have the power to grant an extension of time for filing an appeal which power resides with the Registrar. I therefore direct that if the applicant wishes to pursue an application for an extension of time for the filing of a cross-appeal in the form set out in its Respondent's Notice it should do so within 14 days of this Decision and notify the opponent and me of the same.
49. In the event that such an application is made it will be incumbent upon the parties to notify me of the outcome of any decision by the Registrar. Pending the Registrar's decision (1) the question of what, if any, further directions are necessary for the conduct of the cross-appeal; and (2) all issues relating to the costs of the appeal and any cross-appeal will be reserved.
50. If the applicant elects not to pursue such an application, then it should notify both the opponent and me within 14 days of this Decision and at the same time provide written submissions on the question of costs of the appeal.
51. The opponent will have 14 days from the receipt of those written submissions to file their submissions in answer.
52. The applicant will have 7 days from the filing of the opponent's submissions on costs to file submissions, if any, strictly in reply.
53. Unless either party requests a hearing within 7 days of the filing of the applicant's submissions in reply the question of the costs of the appeal will be determined by me on the basis of the papers before me.

EMMA HIMSWORTH KC

Appointed Person

28 July 2025