BL O/0922/25

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO. UK00003745124 IN THE NAME OF AKG FOODS LTD FOR THE TRADE MARK

IN CLASSES 29, 30 AND 32

AND IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF INVALIDITY THERETO UNDER NO. 505560

BY P. & B. FOODS HOLDINGS LIMITED

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF E FISHER (O/0143/25) DATED 17 FEBRUARY 2025.

DECISION

Introduction

1. This is an appeal by AKG Foods Ltd ("**Appellant**") from decision O/0143/25 of E. Fisher ("**Decision**") concerning the application by P. & B. Foods Holdings Limited ("**Respondent**") for a declaration of invalidity of the Appellant's registered trade mark number 3745124 for the following mark ("**Contested Registration**"):

2. The application for registration was filed on 19 January 2022 and the trade mark was registered on 15 April 2022 in respect of the following goods:

> **Class 29**: *Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; prepared meals; soups and potato crisps.*
>
> **Class 30**: *Sugar, rice, tapioca, sago; flour and preparations made from cereals, bread, pastry and confectionery, edible ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes.*
>
> **Class 32**: *Mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; de-alcoholized drinks, non-alcoholic beers, and Indian drinks jeera soda, soda water.*

3. On 15 November 2022, the Respondent filed an application for a declaration of invalidity of the Contested Registration in its entirety. The application was based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("**the Act**"). Under sections 5(2)(b) and 5(3) the Respondent relied upon the following trade marks, each of which was registered for the mark shown below ("**Earlier Marks**"):

Mark No.	Filing & Registration dates	Goods relied upon
909749052	18/02/2011, 22/07/2011	**Class 29**: *Preserved, dried and cooked fruits and vegetables; dried lentils; fruit pulp; edible oils.* **Class 30**: *Rice, flour; cereals, cereal products and farinaceous products, all for food for human consumption; food preparations included in class 30 for use in baking; pastry, sauces, seasonings (not being essential oils), and condiments.* **Class 31**: *Fruits and vegetables; grains, nuts and seeds.*
913808977	10/03/2015, 07/07/2015	**Class 2**: *Food colorings; colorings for beverages.* **Class 3**: *Perfumery, essential oils, cosmetics; mustard oil, coconut oil, jasmine oil, all for cosmetic purposes.* **Class 32**: *Non-alcoholic drinks; fruit drinks and fruit juices; syrups for the preparation of beverages.*

4. Under s. 5(4)(a) the Respondent relied upon two unregistered signs (shown below), both of which the Respondent claimed to have used throughout the UK since 18 February 2011 in relation to the following goods:

Food, drink, condiments, spices; preserved, dried and cooked fruits and vegetables; dried lentils; fruit pulp; edible oils; rice, flour; cereals, cereal products and farinaceous products, all for food for human consumption; food preparations for use in baking; pastry, sauces, seasonings (not being essential oils), and condiments; fruits and vegetables; grains, nuts and seeds; non-alcoholic drinks; fruit drinks and fruit juices; syrups for the preparation of beverages.

5. The Appellant filed a defence and counterstatement denying each ground of invalidation. It requested proof of use of the Earlier Marks and proof of the Respondent's claimed reputation

and goodwill. The Respondent filed evidence in chief, the Appellant filed written submissions and the Respondent filed evidence in reply. A hearing was held, following which Mrs E. Fisher for the Registrar held that the application for invalidity failed in its entirety.

6. On 17 March 2025 the Appellant filed a Notice to Appeal to the Appointed Person against the Decision under Section 76 of the Trade Marks Act 1994.

The Hearing Officer's decision

7. The Hearing Officer held as follows (in summary, and insofar as is relevant to this appeal):

   a. The average consumer could include both the general public and wholesalers. The level of attention paid would be average, or in some instances lower than average, in the case of members of the general public, and no lower than average in the case of wholesalers. The selection process would be predominantly visual, although an aural component cannot be discounted;

   b. The dominant element of the Contested Registration is the letters "AKG", which make the greatest contribution to the overall impression, closely followed by the large wheatsheaf devices, which surround and bring together the other elements. The green circular device, whilst simply being the background, is also prominent; it makes a contribution to the mark as a whole, though to a lesser degree than "AKG" and the wheatsheaf devices. The remaining elements – the crown, decorative device, gold circular device and gold ring – they play only minor roles in the mark and could be overlooked.

   c. As for the Earlier Marks, whereas the word "HeeRa" and the bird device are equally dominant, the word "HeeRa" is the most distinctive element. However, the bird device does contribute to the overall impression, along with the words "QUALITY PRODUCT", the black circle device and the wheatsheaf devices, all of which play a slightly lesser role but will not be overlooked. The white ring on the periphery has a minor impact and could be overlooked.

   d. The marks are visually similar to a low degree, aurally dissimilar and conceptually neutral;

   e. The Earlier Mark has a high degree of inherent distinctive character. The Hearing Officer was not persuaded on the evidence that its distinctive character is enhanced through use;

   f. The Hearing Officer carried out her analysis in relation to identical goods: *preserved, dried and cooked fruits and vegetables* in Class 29 and *fruit drinks and fruit juices* in Class 32;

   g. There is no likelihood of direct or indirect confusion;

   h. The marks are sufficiently dissimilar that no link would be made in the mind of the general public, and accordingly there can be no unfair advantage or detriment;

   i. There is no misrepresentation in relation to the identical goods, and accordingly the s. 5(4) ground failed;

   j. The opposition was accordingly unsuccessful.

Grounds of Appeal

8. The Appellant's Grounds of Appeal are as follows:

a. **Ground 1**: The Hearing Officer was wrong to find that the visual similarities of the marks was low despite accepting that the common elements would not be overlooked.

b. **Ground 2**: The Hearing Officer was wrong to reject the evidence of the Appellant's witness Mr Bawani regarding actual confusion.

c. **Ground 3**: The Hearing Officer was wrong to reject the evidence of the Appellant's witness Mr Bhatoa regarding actual confusion.

d. **Ground 4**: The Hearing Officer erred in failing to assess the strength of the reputation of the Earlier Marks.

9. The Appellant's Counsel, Jamie Muir Wood, expanded upon the above in his skeleton argument and at the hearing, and I set out below further details as are necessary to understand my overall conclusions. The Respondent's Counsel, Becky Knott, filed written submissions but did not attend the hearing. I thank both Counsel for their clear written and (in the Appellant's case) oral submissions, which I found very helpful.

Standard of review

10. The approach to be adopted in an appeal hearing has been laid down a number of times in case law, most recently in *Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc* [2025] UKSC 25 at §§94-95:

> "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 LJJ) 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.""

11. Further guidance was provided in *Axogen v Aviv* [2022] EWHC 95 (Ch) at §24-25:

"24. Although I was referred to numerous cases on the subject (including *English v Emery Demibold & Struck Ltd* [2002] 1 WLR 2409, *REEF Trade Mark* [2003] RPC 5, *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, *Shanks v Unilever Plc* [2014] RPC 29, *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17, *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch), *Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 and *NINEPLUS* O/039/21), the approach of the appeal court to a statutory appeal under section 76(1) of the TMA is uncontroversial. I bear the following principles, relevant to the issues before me, firmly in mind:

i) The appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd* (O/017/17) at [52(i)]);

ii) The appeal court will allow an appeal where the decision of the lower court was "wrong" (see CPR 52.11). Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference (*NINEPLUS* O/039/21 at [14]);

iii) The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group* at [81]);

iv) The approach required by the appeal court depends on a number of variables including the nature of the evaluation in question (*REEF Trade Mark* [2003] RPC per at [26]). There is a "spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision" (*TT Education* at [52(ii)]), with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum.

v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court 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. Special caution is required before overturning such decisions (*TT Education* at [52(iv)], *REEF* at [28] and *Fine & Country* at [50]-[51]).

vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible (*Actavis Group* at [80]).

vii) Another variable to be taken into account will be "the standing and experience of the fact-finding judge or tribunal" (*REEF* at [26], *Actavis Group* at [78]). Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts (*Shanks* at [28] citing the warning given by Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49).

viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; "The duty to give reasons must not be turned into an intolerable burden" (see *REEF* at [29]). The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted (*English* at [17], *Fage* at [115]). The issues the resolution of which were vital to the judge's conclusions should be identified and the manner in which she resolved them explained (*English* at [19]).

ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (*TT Education* at [52(vi)]).”

12. To the above should be added the judgment of the Court of Appeal in *Lidl Great Britain Ltd v. Tesco Stores Ltd* [2024] EWCA Civ 262, where Arnold LJ said at §110 “It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable”.

13. I shall bear all the above in mind when reviewing the Decision.

Discussion

(1) The Hearing Officer was wrong to find that the visual similarities of the marks was low despite accepting that the common elements would not be overlooked

14. The Appellant contends that the Hearing Officer noted that various aspects of the Earlier Marks and the Contested Registration would not be overlooked. These include non-textual elements

which are present in both marks. Accordingly, her finding that the degree of visual similarity is low was wrong.

15. In support of the above, the Appellant further contends that there is an inconsistency in the Hearing Officer's analyses of the Earlier Mark and the Contested Registration. For the Contested Registration, the Hearing Officer at §29 ordered the contributions to overall impression as follows:

- "AKG" makes the greatest contribution;
- Closely followed by the large wheatsheaf devices;
- The green circular device makes a contribution, albeit to a lesser extent; and
- The remaining elements play only minor roles and could be overlooked.

16. For the Earlier Mark, her ordering of contribution to overall impression (at §30) was:

- "HeeRa" makes the greatest contribution;
- The bird device, the words "QUALTY PRODUCT", the black circle device and the wheatsheaf devices play a slightly lesser role but will not be overlooked;
- The white ring on the periphery has a minor impact and could be overlooked.

17. For my part, I can see no inconsistency at all in the above – in each case, the central letters play the greatest role, but the common element (the wheatsheaf devices) "closely follow[s]" in the Contested Registration and "play[s] a slightly lesser role" in the Earlier Marks.

18. As I see it, there are two difficulties with the contention that the Hearing Officer's finding of a low degree of visual similarity was wrong. First, I remind myself of the cautionary advice provided by Iain Purvis QC (as he then was) in §23 of *GREYBOX* O/106/20:

> "I do not consider there is any great value in debating differences between '*fairly low*' and '*medium*' degrees of similarity in the context of the overall assessment of likelihood of confusion. Certainly, I do not consider that such fine distinctions can properly be characterized as errors of principle. They are at best simply disagreements about the precise 'weight' to be given to a factor in the overall assessment, something which the Courts have consistently rejected as a proper ground of Appeal. Furthermore, given the lack of clarity and subjectivity of the terms in question, it is impossible to have any sensible debate on Appeal about whether the Hearing Officer was right".

19. Secondly, and more insuperably, even if the Hearing Officer's categorisation of the degree of similarity was wrong, it would not impact on her ultimate analysis of likelihood of confusion. That is because, rather than simply carrying out her analysis of likelihood of confusion on the basis of a low degree of visual similarity, the Hearing Officer first reminded herself of her underlying breakdown of the individual contributions to overall impression at §51:

> "The marks share the circle device and the wheatsheaf edging. For me to be satisfied that there is a likelihood of direct confusion requires me to find that the average consumer will misremember the remaining elements. For the elements I have found to play a minor role, and which may be overlooked, (the crown, decorative device, gold circular device and gold ring in the contested mark, and the white ring in the earlier marks) this is entirely possible. The same cannot be said for the words "AKG" and "HeeRa", which I have found

to be the most distinctive elements in their respective marks; they are also dominant in their respective marks, either solus, or jointly with one other element".

20. There is no challenge to any of those individual findings, and the Hearing Officer's careful analysis of the contribution and impact of each of the elements, and her final conclusion as to likelihood of confusion, were all ones she was entitled to make.

21. I dismiss this first ground of appeal.

(2) The Hearing Officer was wrong to reject the evidence of the Appellant's witness Mr Bawani regarding actual confusion

(3) The Hearing Officer was wrong to reject the evidence of the Appellant's witness Mr Bhatoa regarding actual confusion

22. The Appellant's witness Mr Bhatoa is an operations manager of the Appellant. He filed a witness statement referring to conversations having taken place in November 2023 between himself and employees of the Appellant, in which people were shown the Respondent's goods. Mr Bhatoa stated that those people thought the Respondent's goods were "related to the HEERA brand, and were shocked that it was a different brand".

23. The Hearing Officer said at §47:

> "… this evidence is deficient in that there are no specific details of (i) the people involved in the conversation, (ii) the question/s that were asked and (iii) the answers that were given. I do not have sufficiently detailed evidence to conclude that this was an instance, or instances, of actual confusion in the marketplace. I therefore give very little weight to it".

24. The Appellant acknowledges that Mr Bhatoa's evidence is not as full as it could have been but contends that nevertheless the Hearing Officer should have placed more weight on it.

25. I do not agree. The weight to be given to the evidence was a matter for the Hearing Officer. As the Respondent contends in its submissions, with which I fully agree, "the Hearing Officer's conclusion is properly, intelligibly, and adequately reasoned. It is clearly not rationally insupportable and is, as such, not open to challenge".

26. The Appellant's witness Mr Bawani is the owner and director of DILSHAD FOODS LIMITED, a customer of the Appellant. Mr Bawani's witness statement included the following:

> "3. I first came across AKG Foods during a purchasing session in July 2022, and noticed its logo […] on the food packaging […]
>
> 4. Upon seeing the AKG Logo, I immediately thought of HEERA and could not be certain whether AKG is in some way associated with P&B.
>
> […]
>
> 6. Throughout the years at My Company, I have become familiar with many food brands and their logos. I can confirm that prior to my discovery of the AKG brand, I have not come across another logo that looks so much like the HEERA Logo in my mind.
>
> 7. My Company would stock and sell both HEERA and AKG products, and I believe they would be purchased by the same customers."

27. The Hearing Officer said at §46:

> "I am not satisfied that this evidence constitutes evidence of actual confusion in the marketplace but rather Zaheer Bawani's opinion on the likelihood of confusion. Even if I am wrong, one example of confusion after the relevant date (being the date on which the Proprietor filed its application) is not what I would consider a powerful factor pointing towards confusion, and I place very little weight on it".

28. The Appellant contends the Hearing Officer was wrong to categorise the above as opinion evidence. I agree with the Appellant in this regard – Mr Bawani was giving evidence of fact as to his apparent confusion. The Appellant further criticises as irrelevant the reference to confusion post-dating the filing date of the Contested Registration. However, even if the Appellant's criticisms are made out, I cannot see that Mr Bawani's evidence could have "moved the dial" in relation to likelihood of confusion. That assessment is multifactorial in nature, and instances of actual confusion are merely one factor to take into account. The Hearing Officer identified clear and cogent reasons, in accordance with the usual principles, why there was no inherent likelihood of confusion. She was entitled not to depart from that provisional finding on the basis of a single alleged instance of actual confusion, and made no error of principle in not doing so.

29. I dismiss the second and third grounds of appeal.

(4) The Hearing Officer erred in failing to assess the strength of the reputation of the Earlier Marks

30. The Hearing Officer said at §60:

> "I can deal with this ground fairly swiftly. I remind myself that I found the marks to be visually similar to a low degree, aurally dissimilar and conceptually neutral. Though it is not determinative, I found no likelihood of confusion under section 5(2)(b). Regardless of the strength of any reputation of the Applicant's earlier marks, the distance between the marks is, in my view, so significant that it overcomes any similarity/identity between the goods and any degree of reputation, such that no link would be made in the mind of the relevant public".

31. The Appellant contends that whilst the Hearing Officer uses 'regardless', the failure to assess the reputation was an error. Had she found, as was open to her, that the reputation was very high, this would have entitled her to find a link.

32. Although Mr Muir Wood for the Appellant pressed this point persuasively at the hearing, having given it further thought I do not accept it. The difficulty with the Appellant's argument is the uncontested findings made by the Hearing Officer at §37 of the Decision, namely that the marks are conceptually neutral and that the verbal elements (which differ between the two marks) are the most distinctive components.

33. As stated at §11(viii) above, mere failure to express a decision as well as it could have been is not in itself a ground of appeal. It seems to me that the Hearing Officer adopted a "short cut" in her analysis. Rather than assessing the level (if any) of repute, and then asking whether there is sufficient similarity between the marks that the average consumer would make a connection between them, she took the Appellant's case at its highest. She assumed that reputation is made out at the highest level, and then considered whether the requisite link would be made in the mind of the relevant public.

34. The requirements of "link" and "connection" are not contained within s. 5(3), but rather are laid down in case law. In *Specsavers International Healthcare Ltd & Ors v Asda Stores Limited* [2012] EWCA Civ 24, Kitchin LJ said at §120:

> "Infringement under this provision requires a certain degree of similarity between the registered mark and the sign, such that the average consumer makes a connection between them. It is not necessary that the degree of similarity is such as to create a likelihood of confusion, but it must be such that the average consumer establishes a link between the registered mark and the sign; and this is to be assessed having regard to all the circumstances of the case …".

35. Whereas a more fully reasoned decision might have spelled this out, the differences between the marks here were such that no link would be made, and therefore no question of unfair advantage or detriment could arise.

36. In my judgment, it was open to the Hearing Officer to reach the conclusion she did as to how the marks would be perceived. The Appellant's complaint ultimately amounts to no more than a criticism of expression. I can identify no legal or factual error requiring intervention. Whilst some decision makers may have preferred to provide explicit conclusions on each of the legal elements, the failure to do so here does not render the decision wrong.

37. Accordingly, notwithstanding Mr Muir Wood's skilful advocacy, I dismiss this fourth ground of appeal.

Conclusion

38. The appeal is unsuccessful. The Contested Registration remains registered.

Costs

39. Clearly, the Respondent has been the successful party in this appeal. In accordance with the scale costs in TPN 2/2016, I order that the Appellant should pay the Respondent the sum of £650.

40. As for the costs below, the Hearing Officer ordered that the Appellant should pay the Respondent £2,000. That order still stands, and accordingly the Respondent must pay the Appellant the sum of £2,650 within 21 days of this decision.

Dr. Brian Whitehead

29 September 2025

Representation

Jamie Muir Wood of Counsel, instructed by Slingsby Partners LLP for the Appellant/ Applicant

Becky Knott of Counsel (who did not attend the hearing but filed written submissions), instructed by Serjeants LLP for the Respondent/ Proprietor